

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P. § Case No. **19-34054-SGJ-11**

Hunter Mountain Investment Trust

Appellant §

vs. §

Highland Capital Management, L.P, et al § **3:23-CV-2071-E**

Appellee §

**[3904] Order Pursuant to Plan "Gatekeeper Provision" and Pre-Confirmation "Gatekeeper Orders"
Denying Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary
Proceeding. Entered on 8/25/2023.**

Volume 16

APPELLANT RECORD

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

HIGHLAND CAPITAL
MANAGEMENT, L.P.

Reorganized Debtor.

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Chapter 11

Case No. 19-34054-sgj11

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**APPELLANT HUNTER MOUNTAIN INVESTMENT TRUST'S
SECOND SUPPLEMENTAL STATEMENT OF THE ISSUES AND
DESIGNATION OF ITEMS FOR INCLUSION IN THE APPELLATE RECORD**

COMES NOW Appellant/Movant Hunter Mountain Investment Trust, both in its individual capacity and derivatively on behalf of the Reorganized Debtor, Highland Capital Management, L.P., and the Highland Claimant Trust,¹ (collectively, "Appellant" or "HMIT"), and files this Second Supplemental² Statement of the Issues and Designation of Items for Inclusion in the Appellate Record pursuant to Federal Rule of Bankruptcy Procedure 8009(a)(1):

**I.
STATEMENT OF THE ISSUES**

- A. Did the bankruptcy court err in determining that the "colorable" claim analysis allowed the court to consider evidence and other non-pleading materials including, but not limited to, the court's reasoning that:
1. the colorability analysis is stricter than a non-evidentiary, Rule 12(b)(6)-type analysis;
 2. the colorability analysis is "akin to the standards applied under the ... *Barton* doctrine";
 3. the colorability analysis requires a "hybrid" of the *Barton* doctrine and "what courts have applied when considering motions to file suit when a vexatious litigant bar order is in place"; and/or,

¹ And in all capacities and alternative derivative capacities asserted in HMIT's Emergency Motion for Leave to File Verified Adversary Proceeding [Dkt. Nos. 3699, 3815, and 3816] ("Emergency Motion"), the supplement to the Emergency Motion [Dkt. No. 3760], and the draft Complaint attached to the same [Dkt. No. 3760-1].

² Appellant files this Second Supplement pursuant to the Clerk's request at Docket #3949 and correspondence on 10/23/2023.

4. “[t]here may be mixed questions of fact and law implicated by the Motion for Leave”?

[See Dkt. Nos. 3781, 3790, 3903-04].

- B. Did the bankruptcy court err in determining that Appellant lacked constitutional or prudential standing to bring its claims in its individual and derivative capacities?

[See Dkt. Nos. 3903-04].

- C. Did the bankruptcy court err in alternatively determining that, even under a non-evidentiary, Rule 12(b)(6)-type analysis, Appellant did not assert colorable claims including, but not limited to, determining that:

1. Appellant’s allegations are conclusory, speculative, or constitute “legal conclusions”;
2. Appellant’s claims or allegations are not “plausible”;
3. Appellant’s allegations pertaining to a *quid pro quo* are “pure speculation”;
4. Proposed Defendant James P. Seery (“Seery”) owed no duty to Appellant in any capacity as a matter of law;
5. Appellant failed “to allege facts in the Proposed Complaint that would support a reasonable inference that Seery breached his fiduciary duty to HMIT or the estate as a result of bad faith, self-interest, or other intentional misconduct rising to the level of a breach of the duty of loyalty”;
6. Appellant’s allegations pertaining to its aiding and abetting and conspiracy claims are speculative and not plausible;
7. The remedies of equitable disallowance and equitable subordination are not remedies “available” to Appellant as a matter of law;
8. Appellant’s unjust enrichment claim is invalid as a matter of law because “Seery’s compensation is governed by express agreements”;
9. Appellant is not entitled to declaratory relief because it has no colorable claims; and/or
10. Appellant cannot recover punitive damages for its breach of fiduciary duty claim?

[See Dkt. Nos. 3903-04].

- D. Alternatively, even if the bankruptcy court correctly determined that its “hybrid” *Barton* analysis controls, did the court violate Appellant’s due process rights by denying Appellant its requested discovery?

[See Dkt. Nos. 3800, 3853, 3903-04, June 8, 2023 Hearing].

- E. Alternatively, did the bankruptcy court err by denying Appellant’s requested discovery including, but not limited to:

1. ordering that Appellant could not request or obtain any discovery other than a deposition of Seery and James D. Dondero; and/or
2. determining that state court “Rule 202” proceedings supported the denial of discovery?

[See Dkt. Nos. 3800 & June 8, 2023 Hearing; *see also* Dkt. Nos. 3903-04].

- F. Alternatively, did the bankruptcy court err by denying Appellant’s alternative request for a continuance to obtain the requested discovery?

- G. Alternatively, did the bankruptcy court err by excluding Appellant’s evidence, or admitting the same for only limited purposes, offered at the June 8, 2023 Hearing?

- H. Alternatively, did the bankruptcy court err by overruling Appellant’s objections to Appellees’ evidence offered at the June 8, 2023 Hearing?

- I. Alternatively, did the bankruptcy court err by excluding Appellant’s experts’ testimony?

[See Dkt. No. 3853; *see also* Dkt. Nos. 3903-04].

- J. Alternatively, did the bankruptcy court err by striking Appellant’s proffer of its excluded experts’ testimony from the record?

[See Dkt. No. 3869].

- K. Alternatively, if the bankruptcy court correctly determined that its “hybrid” *Barton* analysis controls, did the bankruptcy court err in determining that Appellant had not asserted colorable claims under that “hybrid” analysis including, but not limited to, its findings that:

1. there is no evidence to support that Seery shared material non-public information with the Claims Purchasers;
2. there is no evidence to support the alleged quid pro quo;
3. the material shared was *public* information; and/or
4. the Claims Purchasers had sufficient and lawful reasons to pay the amounts paid

for the purchased claims.

[See Dkt. Nos. 3903-04].

- L. Did the bankruptcy court err in finding that Appellant is controlled by Dondero, and, as such, Appellant “cannot show that it is pursuing the Proposed Claims for a proper purpose”?
- M. Alternatively, does sufficient evidence support the bankruptcy court’s evidentiary findings made pursuant to its “hybrid” *Barton* analysis?
- N. Did the bankruptcy court err in denying an expedited hearing on Appellant’s Motion for Leave? [See Dkt. 3713].
- O. Does the bankruptcy court’s use of a new “colorability” standard to determine if claims by non-debtors against other non-debtors may proceed violate *Stern v. Marshall* and its progeny?
- P. Did the bankruptcy court err in denying Appellant’s Motion to Alter or Amend Order, to Amend or Make Additional Findings, for Relief from Order, or Alternatively, for New Trial under Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024 including, but not limited to by:
 - 1. declining to consider disclosures that demonstrated that Appellant is “in the money”—an issue pertinent to the court’s erroneous standing decisions; and
 - 2. concluding that the disclosures failed to reinforce Appellant’s standing to pursue the claims presented?

[Dkt. 3936].

II.
DESIGNATION OF ITEMS FOR INCLUSION
IN THE APPELLATE RECORD

Vol. 1
1. Notice of Appeal

- a.** Notice of Appeal [Dkt. 3906];
- b.** Amended Notice of Appeal [Dkt. 3908]; and
- c.** Second Amended Notice of Appeal [Dkt. 3945]

2. The judgment, order, or decree appealed from:

- a.** Memorandum Opinion and Order Pursuant to Plan “Gatekeeper Provision” and Pre-Confirmation “Gatekeeper Orders”: Denying Hunter Mountain Investment

000835
000940

Trust's Emergency Motion for Leave to File Adversary Proceedings [Dkts. 3903 & 3904]; and

001045

- b. Order Denying Motion of Hunter Mountain Investment Trust Seeking Relief Pursuant to Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024 [Dkt. 3936].

3. Docket sheet.

001049

- a. Bankruptcy Case No. 19-34054

4. Other Items to be included:

- a. HMIT hereby designates the following items in the record on appeal from Cause No. 19-34054-sgj11:

Vol. 2	FILE DATE	DOCKET NO. (INCLUDING ALL ATTACHMENTS AND APPENDICES)	DESCRIPTION
001594	01/22/2021	1808	Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified)
001660	02/22/2021	1943	Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief
001821	09/09/2022	3503	Motion to Conform Plan filed by Highland Capital Management, L.P.
001830	02/27/203	3671	Memorandum Opinion and Order on Reorganized Debtor's Motion to Conform Plan
Vol. 3 001849	03/28/2023	3699 (3699-1 — 3699-5)	HMIT Emergency Motion for Leave to File Verified Adversary Proceeding and Attached Verified Adversary Complaint
Vol. 4 002236	03/28/2023	3700 (3700-1)	HMIT Motion for Expedited Hearing on Emergency Motion for Leave to File Verified Adversary Proceeding
002243	03/30/2023	3704	Farallon, Stonehill, Jessup and Muck Objection to Motion for Expedited Hearing
002248	03/30/2023	3705	HMIT Amended Certificate of Conference

Vol. 5 002251	03/30/2023	3706	HMIT Amended Certificate of Conference
002254	03/30/2023	3707	Highland's Response in Opposition to Emergency Motion for Leave
002262	03/30/2023	3708 (3708-1 — 3708-8)	Declaration of John Morris in Support of the Highland Parties' Objection to Hunter Mountain Investment Trust's Opposed Application for Expedited Hearing on Emergency Motion for Leave to File Verified Adversary Proceeding
002348	03/31/2023	3712	HMIT Reply in Support of Application for Expedited Hearing
002355	03/31/2023	3713	Order Denying Motion for Expedited Hearing
002358	04/04/2023	3718 (3718-1 — 3718-4)	HMIT Motion for Leave to File Appeal
002391	04/04/2023	3719 (3719-1)	HMIT Motion for Expedited Hearing on Motion for Leave to File Appeal
002398	04/05/2023	3720	Order Denying HMIT's Opposed Motion for Expedited Hearing
002400	04/05/2023	3721 (3721-1 — 3721-2) Thru Vol. 7	HMIT Notice of Appeal
Vol. 8 002826	04/06/2023	3726 (3726-1) Thru Vol. 9	Certificate of Mailing regarding HMIT Notice of Appeal
Vol. 9 003257	04/07/2023	3731	Notice of Docketing Transmittal of Notice of Appeal
003260	04/13/2023	3738 (3738-1)	Highland's Opposed Emergency Motion to Modify and Fix a Briefing Schedule and Set a Hearing Date with Respect to HMIT's Emergency Motion for Leave
003270	04/13/2023	3739	Highland's Motion for Expedited Hearing
003278	04/13/2023	3740	Joinder to Highland's Emergency Motion to Modify and Fix Briefing Schedule and Set Hearing Date With Respect to Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding filed by Farallon

		Capital Management, LLC, Jessup Holdings LLC, Muck Holdings LLC, Stonehill Capital Management LLC	
1	04/13/2023	3741	Notice of Hearing for 04/24/2023 at 1:30 PM
6	04/13/2023	3742	Amended Notice of Hearing for 04/24/2023 at 1:30 PM
11	04/13/2023	3745	Notice of Appearance and Request for Notice by Omar Jesus Alaniz filed by James P. Seery Jr.
94	04/15/2023	3747	Joinder by James P. Seery Jr. to Highland's Emergency Motion to Modify and Fix Briefing Schedule and Set Hearing Date with Respect to Hunter Mountain Investment Trusts Emergency Motion for Leave to File Verified Adversary Proceeding
6	04/17/2023	3748	HMIT's Response and Reservation of Rights
9	04/19/2023	3751	Notice of Status Conference
02	04/21/2023	3758	HMIT's Objection Regarding Evidentiary Hearing and Brief Concerning Gatekeeper Proceedings Relating to "Colorability"
1	04/21/2023	3759	HMIT's Notice of Rescheduling Hearing
14	04/21/2023	3761	HMIT's Objection Regarding Evidentiary Hearing and Brief Concerning Gatekeeper Proceedings Relating to "Colorability" ³
23	04/23/2023	3760 (3760-1)	HMIT's Supplement to Emergency Motion for Leave to File Verified Adversary Proceeding and Attached Verified Adversary Complaint
8	04/25/2023	3765	Transcript of Hearing held on 04/24/2023
30	05/11/2023	3780	Objection to Hunter Mountain Investment Trust's (i) Emergency Motion for Leave to File Verified Adversary Proceeding; and (ii) Supplement to Emergency Motion for Leave to File Verified Adversary Proceeding filed by Farallon Capital Management, LLC, Jessup Holdings LLC, Muck

³ A duplicate of Doc 3758.

Vol. 10 003458		Holdings LLC, Stonehill Capital Management LLC
003463	05/11/2023 3781	Order Fixing Briefing Scheduling and Hearing Date with Respect to HMIT's Emergency Motion for Leave to File Verified Adversary Proceeding as Supplemented
Vol. 11 003537	05/11/2023 3783	Highland and Seery's Joint Response to HMIT's Emergency Motion for Leave
Vol. 17 004665	05/11/2023 3784 (3784-1 — 3784-46) Thru Vol. 16	Declaration of John Morris in Support of Highland Parties' Joint Response
004712	05/18/2023 3785	HMIT's Reply in Support of Emergency Motion for Leave to File Adversary Proceeding
004714	05/22/2023 3787	Order Pertaining to the Hearing on Hunter Mountain Investment Trust's Motion for Leave to File Adversary Proceeding [DE##3699 & 3760]
004808	05/24/2023 3788 (3788-1 — 3788-5)	HMIT's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of June 8, 2023 Hearing
004813	05/24/2023 3789	HMIT's Application for Expedited Hearing
004836	05/24/2023 3790	Order Pertaining to the Hearing on Hunter Mountain Investment Trust's Motion for Leave to File Adversary Proceeding [DE##3699 & 3760]
Vol. 18 004930	05/25/2023 3791 (3791-1 — 3791-5)	HMIT's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of June 8, 2023 Hearing
004931	05/25/2023 3792	Order Setting Expedited Hearing
	05/25/2023 3795	Objection to Hunter Mountain Investment Trust's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of June 8, 2023 Hearing filed by Farallon Capital Management, LLC, Jessup Holdings LLC, Muck Holdings LLC, Stonehill Capital Management LLC

05/25/2023	3798 (3798-1)	Highland Parties' Joint Response in Opposition to HMIT's Emergency Motion for Expedited Discovery
05/26/2023	3800	Order Regarding Hunter Mountain Investment Trust's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of the June 8, 2023 Hearing
05/28/2023	3801	Order Regarding Hunter Mountain Investment Trust's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of the June 8, 2023 Hearing
06/05/2023	3815 (3815-1)	Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding
06/05/2023	3816 (3816-1)	Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding
06/05/2023	3817 (3817-1 — 3817-5)	Highland Parties' Witness and Exhibit List with Respect to Evidentiary Hearing on June 8, 2023
06/05/2023	3818 (3818-1 — 3818-9)	HMIT's Witness and Exhibit List in Connection with its Emergency Motion for Leave to File Verified Adversary Proceeding, and Supplement
06/07/2023	3820	Highland Parties' Joint Motion to Exclude Testimony and Documents of Scott Van Meter and Steve Pully
06/07/2023	3821 (3821-1 — 3821-3)	Declaration in Support of Highland Parties' Joint Motion to Exclude Testimony and Documents of Scott Van Meter and Steve Pully
06/07/2023	3822 (3822-1)	HMIT's Unopposed Motion to File Exhibit Under Seal [WITHDRAWN]
06/07/2023	3823	Joinder to Joint Motion to Exclude Testimony and Documents of Scott Van Meter and Steve Pully filed by Farallon Capital Management, LLC, Jessup Holdings LLC, Muck Holdings LLC, Stonehill Capital Management LLC

06/07/2023	3824	HMIT's Objections to the Highland Parties' Exhibit and Witness List
06/08/2023	3828	HMIT's Response to Highland Claimant Trust and James P. Seery, Jr.'s Joint Motion to Exclude Testimony and Documents of Experts Scott Van Meter and Steve Pully
06/09/2023	3837	Request for transcript regarding hearing held on 06/08/2023
06/12/2023	3838	Court admitted exhibits on hearing June 8, 2023 (See Docket Entry Nos. 3817 & 3818)
06/12/2023	3841	Highland Parties' Reply in Further Support of their Joint Motion to Exclude Testimony and Documents of Scott Van Meter and Steve Pully
06/12/2023	3842 (3842-1)	Claim Purchasers' Joinder to Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery Jr.'s Reply in Further Support of Their Joint Motion to Exclude Testimony and Documents of Scott Van Meter and Steve Pully filed by Farallon Capital Management, LLC, Jessup Holdings LLC, Muck Holdings LLC, Stonehill Capital Management LLC
06/13/2023	3843	Transcript regarding Hearing Held 06/08/2023
06/13/2023	3844	Transcript regarding Hearing Held 05/26/2023
06/13/2023	3845	HMIT's Request for Oral Hearing or, Alternatively, a Schedule for Evidentiary Proffer
06/13/2023	3846	Response in Opposition to Hunter Mountain Investment Trust's Request for Oral Argument or, Alternatively, a Schedule for Evidentiary Proffer filed by Debtor Highland Capital Management, L.P., Other Professional Highland Claimant Trust, Creditor James P. Seery Jr.
06/13/2023	3847	HMIT's Reply to the Highland Parties' Response to Request for Oral Hearing
06/16/2023	3853	Memorandum Opinion and Order Granting Joint Motion to Exclude Expert Evidence

Vol. 42 009928	06/16/2023	3854	Memorandum Opinion and Order Granting Joint Motion to Exclude Expert Evidence
009944	06/19/2023	3858 (3858-1 — 3858-2)	Hunter Mountain Investment Trust's Evidentiary Proffer Pursuant to Rule 103(a)(2) ⁴
010013	06/23/2023	3860	The Highland Parties' Objections to and Motion to Strike Hunter Mountain Investment Trust's Purported Proffer
010023	06/23/2023	3861	Claim Purchasers' Joinder to the Highland Parties' Objections and Motion to Strike Hunter Mountain Investment Trust's Purported Proffer
010025	07/05/2023	3869	Order Striking HMIT's Evidentiary Proffer Pursuant to Rule 103(a)(2) and Limiting Briefing
010029	07/06/2023	3872	Notice of Filing of the Current Balance Sheet of the Highland Claimant Trust filed by Debtor Highland Capital Management, L.P. and the Highland Claimant Trust
010035	07/21/2023	3888	Post-Confirmation Report for Highland Capital Management, LP for the Quarter Ending June 30, 2023 filed by Highland Capital Management, L.P.
010047	07/21/2023	3889	Post-Confirmation Report for Highland Capital Management, LP for the Quarter Ending June 30, 2023 filed by the Highland Claimant Trust
010059	08/17/2023	3901	Withdrawal of HMIT's Unopposed Motion to File Exhibit Under Seal filed by Creditor Hunter Mountain Investment Trust
Vol. 43 010062	09/08/2023	3905 (3905-1 — 3905-6)	Motion to Alter or Amend Order, to Amend or Make Additional Findings, for Relief from Order, or, Alternatively, for New Trial Under Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024 and Incorporated Relief Filed by Creditor Hunter Mountain Investment Trust

⁴ HMIT understands that the Court struck this proffer in docket entry 3869. Because the proffer appears to remain on the record and to avoid any argument that HMIT has failed its burden to designate the record, HMIT designates this docket entry out of an abundance of caution.

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09/11/2023	3907	Clerk's Correspondence regarding HMIT's Notice of Appeal
09/22/2023	3928	Notice Regarding Appeal and Pending Post-Judgment Motion filed by HMIT

B. Exhibits.

Further, the Parties submitted hearing exhibits. HMIT designates for inclusion in the record for appeal all the hearing exhibits submitted to the Court, which were all electronically filed and are in the Court's record and are a part of this Appellate Record. (Docs. 3817 and 3818). The following exhibits are submitted and included in the Court's record:

<u>HMIT Exhibits</u> (Dkts. 3818, 3818-1, 3818-2, 3818-3, 3818-4, 3818-5, 3818-6, 3818-7, 3818-8, and 3818-9)
HMIT Exhibits 1-4, 6-80
<u>HCM Exhibits</u> (Dkts. 3817, 3817-1, 3817-2, 3817-3, 3817-4, 3817-5)
HCM Exhibits 2-15, 25-34, 36, 38-42, 45-46, 51, 59-60, 100

Dated: October 23, 2023

Respectfully Submitted,

**PARSONS MCENTIRE MCCLEARY
PLLC**

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Trust*

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served via ECF notification on October 23, 2023, on all parties receiving electronic notification.

/s/ Sawnie A. McEntire
Sawnie A. McEntire

(vi) reserve or retain any cash or cash equivalents in an amount reasonably necessary to meet claims and contingent liabilities (including Disputed Claims and any indemnification obligations that may arise under Section 8.2 of this Agreement), to maintain the value of the Claimant Trust Assets, or to fund ongoing operations and administration of the Litigation Sub-Trust;

(vii) borrow as may be necessary to fund activities of the Claimant Trust;

(viii) determine whether the conditions under Section 5.1(c) of this Agreement have been satisfied such that a certification should be filed with the Bankruptcy Court;

(ix) invest the Claimant Trust Assets, proceeds thereof, or any income earned by the Claimant Trust (for the avoidance of doubt, this shall not apply to investment decisions made by the Reorganized Debtor or its subsidiaries solely with respect to Managed Funds);

(x) change the compensation of the Claimant Trustee;

(xi) subject to ARTICLE X, make structural changes to the Claimant Trust or take other actions to minimize any tax on the Claimant Trust Assets; and

(xii) retain counsel, experts, advisors, or any other professionals; provided, however, the Claimant Trustee shall not be required to obtain the consent of the Oversight Board for the retention of (i) PSZJ, WilmerHale, or Development Specialists, Inc. and (ii) any other professional whose expected fees and expenses are estimated at less than or equal to \$200,000.

(c) [Reserved.]

3.4 Investment of Cash. The right and power of the Claimant Trustee to invest the Claimant Trust Assets, the proceeds thereof, or any income earned by the Claimant Trust, with majority approval of the Oversight Board, shall be limited to the right and power to invest in such Claimant Trust Assets only in Cash and U.S. Government securities as defined in section 29(a)(16) of the Investment Company Act; provided, however that (a) the scope of any such permissible investments shall be further limited to include only those investments that a “liquidating trust” within the meaning of Treasury Regulation Section 301.7701-4(d), may be permitted to hold, pursuant to the Treasury Regulations, or any modification in the Internal Revenue Service (“IRS”) guidelines, whether set forth in IRS rulings, other IRS pronouncements, or otherwise, (b) the Claimant Trustee may retain any Claimant Trust Assets received that are not Cash only for so long as may be required for the prompt and orderly monetization or other disposition of such assets, and (c) the Claimant Trustee may expend the assets of the Claimant Trust (i) as reasonably necessary to meet contingent liabilities (including indemnification and similar obligations) and maintain the value of the assets of the Claimant Trust during the pendency of this Claimant Trust, (ii) to pay Claimant Trust Expenses (including, but not limited to, any taxes imposed on the Claimant Trust and reasonable attorneys’ fees and expenses in connection with litigation), and (iii) to satisfy other liabilities incurred or assumed by the Claimant Trust (or to which the assets are otherwise subject) in accordance with the Plan or this Agreement).

3.5 Binding Nature of Actions. All actions taken and determinations made by the Claimant Trustee in accordance with the provisions of this Agreement shall be final and binding upon any and all Beneficiaries.

3.6 Term of Service. The Claimant Trustee shall serve as the Claimant Trustee for the duration of the Claimant Trust, subject to death, resignation or removal.

3.7 Resignation. The Claimant Trustee may resign as Claimant Trustee of the Claimant Trust by an instrument in writing delivered to the Bankruptcy Court and Oversight Board at least thirty (30) days before the proposed effective date of resignation. The Claimant Trustee shall continue to serve as Claimant Trustee after delivery of the Claimant Trustee's resignation until the proposed effective date of such resignation, unless the Claimant Trustee and a simple majority of the Oversight Board consent to an earlier effective date, which earlier effective date shall be no earlier than the date of appointment of a successor Claimant Trustee in accordance with Section 3.9 hereof becomes effective.

3.8 Removal.

(a) The Claimant Trustee may be removed by a simple majority vote of the Oversight Board for Cause immediately upon notice thereof, or without Cause upon 60 days' prior written notice. Upon the removal of the Claimant Trustee pursuant hereto, the Claimant Trustee will resign, or be deemed to have resigned, from any role or position he or she may have at New GP LLC or the Reorganized Debtor effective upon the expiration of the foregoing 60 day period unless the Claimant Trustee and a simple majority of the Oversight Board agree otherwise.

(b) To the extent there is any dispute regarding the removal of a Claimant Trustee (including any dispute relating to any compensation or expense reimbursement due under this Agreement) the Bankruptcy Court shall retain jurisdiction to consider and adjudicate such dispute. Notwithstanding the foregoing, the Claimant Trustee will continue to serve as the Claimant Trustee after his removal until the earlier of (i) the time when a successor Claimant Trustee will become effective in accordance with Section 3.9 of this Agreement or (ii) such date as the Bankruptcy Court otherwise orders.

3.9 Appointment of Successor.

(a) Appointment of Successor. In the event of a vacancy by reason of the death or Disability (in the case of a Claimant Trustee that is a natural person), dissolution (in the case of a Claimant Trustee that is not a natural person), or removal of the Claimant Trustee, or prospective vacancy by reason of resignation, a successor Claimant Trustee shall be selected by a simple majority vote of the Oversight Board. If Members of the Oversight Board are unable to secure a majority vote, the Bankruptcy Court will determine the successor Claimant Trustee on motion of the Members. If a final decree has been entered closing the Chapter 11 Case, the Claimant Trustee may seek to reopen the Chapter 11 Case for the limited purpose of determining the successor Claimant Trustee, and the costs for such motion and costs related to re-opening the Chapter 11 Case shall be paid by the Claimant Trust. The successor Claimant Trustee shall be appointed as soon as practicable, but in any event no later than sixty (60) days after the occurrence of the

vacancy or, in the case of resignation, on the effective date of the resignation of the then acting Claimant Trustee.

(b) Vesting or Rights in Successor Claimant Trustee. Every successor Claimant Trustee appointed hereunder shall execute, acknowledge, and deliver to the Claimant Trust, the exiting Claimant Trustee, the Oversight Board, and file with the Bankruptcy Court, an instrument accepting such appointment subject to the terms and provisions hereof. The successor Claimant Trustee, without any further act, deed, or conveyance shall become vested with all the rights, powers, trusts and duties of the exiting Claimant Trustee, except that the successor Claimant Trustee shall not be liable for the acts or omissions of the retiring Claimant Trustee. In no event shall the retiring Claimant Trustee be liable for the acts or omissions of the successor Claimant Trustee.

(c) Interim Claimant Trustee. During any period in which there is a vacancy in the position of Claimant Trustee, the Oversight Board shall appoint one of its Members to serve as the interim Claimant Trustee (the “Interim Trustee”) until a successor Claimant Trustee is appointed pursuant to Section 3.9(a). The Interim Trustee shall be subject to all the terms and conditions applicable to a Claimant Trustee hereunder. Such Interim Trustee shall not be limited in any manner from exercising any rights or powers as a Member of the Oversight Board merely by such Person’s appointment as Interim Trustee.

3.10 Continuance of Claimant Trust. The death, resignation, or removal of the Claimant Trustee shall not operate to terminate the Claimant Trust created by this Agreement or to revoke any existing agency (other than any agency of the Claimant Trustee as the Claimant Trustee) created pursuant to the terms of this Agreement or invalidate any action taken by the Claimant Trustee. In the event of the resignation or removal of the Claimant Trustee, the Claimant Trustee shall promptly (i) execute and deliver, by the effective date of resignation or removal, such documents, instruments, records, and other writings as may be reasonably requested by his successor to effect termination of the exiting Claimant Trustee’s capacity under this Agreement and the conveyance of the Claimant Trust Assets then held by the exiting Claimant Trustee to the successor Claimant Trustee; (ii) deliver to the successor Claimant Trustee all non-privileged documents, instruments, records, and other writings relating to the Claimant Trust as may be in the possession or under the control of the exiting Claimant Trustee, provided, the exiting Claimant Trustee shall have the right to make and retain copies of such documents, instruments, records and other writings delivered to the successor Claimant Trustee and the cost of making such copies shall be a Claimant Trust Expense to be paid by the Claimant Trust; and (iii) otherwise assist and cooperate in effecting the assumption of the exiting Claimant Trustee’s obligations and functions by his successor, provided the fees and expenses of such assistance and cooperation shall be paid to the exiting Claimant Trustee by the Claimant Trust. The exiting Claimant Trustee shall irrevocably appoint the successor Claimant Trustee as his attorney-in-fact and agent with full power of substitution for it and its name, place and stead to do any and all acts that such exiting Claimant Trustee is obligated to perform under this Section 3.10.

3.11 Claimant Trustee as “Estate Representative”. The Claimant Trustee will be the exclusive trustee of the Claimant Trust Assets for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code (the “Estate Representative”) with respect to the Claimant

Trust Assets, with all rights and powers attendant thereto, in addition to all rights and powers granted in the Plan and in this Agreement; provided that all rights and powers as representative of the Estate pursuant to section 1123(b)(3)(B) shall be transferred to the Litigation Trustee in respect of the Estate Claims and the Employee Claims. The Claimant Trustee will be the successor-in-interest to the Debtor with respect to any action pertaining to the Claimant Trust Assets, which was or could have been commenced by the Debtor prior to the Effective Date, except as otherwise provided in the Plan or Confirmation Order. All actions, claims, rights or interest constituting Claimant Trust Assets are preserved and retained and may be enforced, or assignable to the Litigation Sub-Trust, by the Claimant Trustee as an Estate Representative.

3.12 Books and Records.

(a) The Claimant Trustee shall maintain in respect of the Claimant Trust and the Claimant Trust Beneficiaries books and records reflecting Claimant Trust Assets in its possession and the income of the Claimant Trust and payment of expenses, liabilities, and claims against or assumed by the Claimant Trust in such detail and for such period of time as may be necessary to enable it to make full and proper accounting in respect thereof. Such books and records shall be maintained as reasonably necessary to facilitate compliance with the tax reporting requirements of the Claimant Trust and the requirements of Article VII herein. Except as otherwise provided herein, nothing in this Agreement requires the Claimant Trustee to file any accounting or seek approval of any court with respect to the administration of the Claimant Trust, or as a condition for managing any payment or distribution out of the Claimant Trust Assets.

(b) The Claimant Trustee shall provide quarterly reporting to the Oversight Board and Claimant Trust Beneficiaries of (i) the status of the Claimant Trust Assets, (ii) the balance of Cash held by the Claimant Trust (including in each of the Claimant Trust Expense Reserve and Disputed Claim Reserve), (iii) the determination and any re-determination, as applicable, of the total amount allocated to the Disputed Claim Reserve, (iv) the status of Disputed Claims and any resolutions thereof, (v) the status of any litigation, including the pursuit of the Causes of Action, (vi) the Reorganized Debtor's performance, and (vii) operating expenses; provided, however, that the Claimant Trustee may, with respect to any Member of the Oversight Board or Claimant Trust Beneficiary, redact any portion of such reports that relate to such Entity's Claim or Equity Interest, as applicable and any reporting provided to Claimant Trust Beneficiaries may be subject to such Claimant Trust Beneficiary's agreement to maintain confidentiality with respect to any non-public information.

(c) The Claimant Trustee may dispose some or all of the books and records maintained by the Claimant Trustee at the later of (i) such time as the Claimant Trustee determines, with the unanimous consent of the Oversight Board, that the continued possession or maintenance of such books and records is no longer necessary for the benefit of the Claimant Trust, or (ii) upon the termination and winding up of the Claimant Trust under Article IX of this Agreement; provided, however, the Claimant Trustee shall not dispose of any books and records related to the Estate Claims or Employee Claims without the consent of the Litigation Trustee. Notwithstanding the foregoing, the Claimant Trustee shall cause the Reorganized Debtor and its subsidiaries to retain such books and records, and for such periods, as are required to be retained pursuant to Section 204-2 of the Investment Advisers Act or any other applicable laws, rules, or regulations.

3.13 Compensation and Reimbursement; Engagement of Professionals.

(a) Compensation and Expenses.

(i) Compensation. As compensation for any services rendered by the Claimant Trustee in connection with this Agreement, the Claimant Trustee shall receive compensation of \$150,000 per month (the “Base Salary”). Within the first forty-five days following the Confirmation Date, the Claimant Trustee, on the one hand, and the Committee, if prior to the Effective Date, or the Oversight Board, if on or after the Effective Date, on the other, will negotiate go-forward compensation for the Claimant Trustee which will include (a) the Base Salary, (b) a success fee, and (c) severance.

(ii) Expense Reimbursements. All reasonable out-of-pocket expenses of the Claimant Trustee in the performance of his or her duties hereunder, shall be reimbursed as Claimant Trust Expenses paid by the Claimant Trust.

(b) Professionals.

(i) Engagement of Professionals. The Claimant Trustee shall engage professionals from time to time in conjunction with the services provided hereunder. The Claimant Trustee’s engagement of such professionals shall be approved by a majority of the Oversight Board as set forth in Section 3.3(b) hereof.

(ii) Fees and Expenses of Professionals. The Claimant Trustee shall pay the reasonable fees and expenses of any retained professionals as Claimant Trust Expenses.

3.14 Reliance by Claimant Trustee. Except as otherwise provided herein, the Claimant Trustee may rely, and shall be fully protected in acting or refraining from acting, on any resolution, statement, certificate, instrument, opinion, report, notice, request, consent, order or other instrument or document that the Claimant Trustee has no reason to believe to be other than genuine and to have been signed or presented by the proper party or parties or, in the case of facsimiles, to have been sent by the proper party or parties, and the Claimant Trustee may conclusively rely as to the truth of the statements and correctness of the opinions or direction expressed therein. The Claimant Trustee may consult with counsel and other professionals, and any advice of such counsel or other professionals shall constitute full and complete authorization and protection in respect of any action taken or not taken by the Claimant Trustee in accordance therewith. The Claimant Trustee shall have the right at any time to seek instructions from the Bankruptcy Court, or any other court of competent jurisdiction concerning the Claimant Trust Assets, this Agreement, the Plan, or any other document executed in connection therewith, and any such instructions given shall be full and complete authorization in respect of any action taken or not taken by the Claimant Trustee in accordance therewith. The Claimant Trust shall have the right to seek Orders from the Bankruptcy Court as set forth in Article IX of the Plan.

3.15 Commingling of Claimant Trust Assets. The Claimant Trustee shall not commingle any of the Claimant Trust Assets with his or her own property or the property of any other Person.

3.16 Delaware Trustee.

(a) The Delaware Trustee shall have the limited power and authority, and is hereby authorized and empowered, to (i) accept legal process served on the Claimant Trust in the State of Delaware; and (ii) execute any certificates that are required to be executed under the Delaware Statutory Trust Act and file such certificates in the office of the Secretary of State of the State of Delaware, and take such action or refrain from taking such action under this Agreement, in either case as may be directed in a writing delivered to the Delaware Trustee by the Claimant Trustee and upon which the Delaware Trustee shall be entitled to conclusively and exclusively rely; provided, however, that the Delaware Trustee shall not be required to take or to refrain from taking any such action if the Delaware Trustee shall believe, or shall have been advised by counsel, that such performance is likely to involve the Delaware Trustee in personal liability or to result in personal liability to the Delaware Trustee, or is contrary to the terms of this Agreement or of any document contemplated hereby to which the Claimant Trust or the Delaware Trustee is or becomes a party or is otherwise contrary to law. The Parties agree not to instruct the Delaware Trustee to take any action or to refrain from taking any action that is contrary to the terms of this Agreement or of any document contemplated hereby to which the Claimant Trust or the Delaware Trustee is or becomes party or that is otherwise contrary to law. Other than as expressly provided for in this Agreement, the Delaware Trustee shall have no duty or power to take any action for or on behalf of the Claimant Trust. For the avoidance of doubt, the Delaware Trustee will only have such rights and obligations as expressly provided by reference to the Delaware Trustee hereunder. The Delaware Trustee shall not be entitled to exercise any powers, nor shall the Delaware Trustee have any of the duties and responsibilities, of the Claimant Trustee set forth herein. The Delaware Trustee shall be one of the trustees of the Claimant Trust for the sole and limited purpose of fulfilling the requirements of Section 3807 of the Delaware Statutory Trust Act and for taking such actions as are required to be taken by a Delaware Trustee under the Delaware Statutory Trust Act. The duties (including fiduciary duties), liabilities and obligations of the Delaware Trustee shall be limited to those expressly set forth in this Section 3.16 and there shall be no other duties (including fiduciary duties) or obligations, express or implied, at law or in equity, of the Delaware Trustee. To the extent that, at law or in equity, the Delaware Trustee has duties (including fiduciary duties) and liabilities relating thereto to the Claimant Trust, the other parties hereto or any beneficiary of the Claimant Trust, it is hereby understood and agreed by the other parties hereto that such duties and liabilities are replaced by the duties and liabilities of the Delaware Trustee expressly set forth in this Agreement.

(b) The Delaware Trustee shall serve until such time as the Claimant Trustee removes the Delaware Trustee or the Delaware Trustee resigns and a successor Delaware Trustee is appointed by the Claimant Trustee in accordance with the terms hereof. The Delaware Trustee may resign at any time upon the giving of at least thirty (30) days' advance written notice to the Claimant Trustee; provided, that such resignation shall not become effective unless and until a successor Delaware Trustee shall have been appointed by the Claimant Trustee in accordance with the terms hereof. If the Claimant Trustee does not act within such thirty (30) day period, the Delaware Trustee may apply to the Court of Chancery of the State of Delaware for the appointment of a successor Delaware Trustee.

(c) Upon the resignation or removal of the Delaware Trustee, the Claimant Trustee shall appoint a successor Delaware Trustee by delivering a written instrument to the

outgoing Delaware Trustee. Any successor Delaware Trustee must satisfy the requirements of Section 3807 of the Delaware Statutory Trust Act. Any resignation or removal of the Delaware Trustee and appointment of a successor Delaware Trustee shall not become effective until a written acceptance of appointment is delivered by the successor Delaware Trustee to the outgoing Delaware Trustee and the Claimant Trustee and any undisputed fees, expenses and indemnity due to the outgoing Delaware Trustee are paid. Following compliance with the preceding sentence, the successor Delaware Trustee shall become fully vested with all of the rights, powers, duties and obligations of the outgoing Delaware Trustee under this Agreement, with like effect as if originally named as Delaware Trustee, and the outgoing Delaware Trustee shall be discharged of its duties and obligations under this Agreement.

(d) The Delaware Trustee shall be paid such compensation as agreed to pursuant to a separate fee agreement. The Claimant Trust shall promptly advance and reimburse the Delaware Trustee for all reasonable out-of-pocket costs and expenses (including reasonable legal fees and expenses) incurred by the Delaware Trustee in connection with the performance of its duties hereunder.

(e) WTNA shall not be responsible or liable for any failure or delay in the performance of its obligations under this Agreement arising out of or caused, directly or indirectly, by circumstances beyond its control, including without limitation, any act or provision of any present or future law or regulation or governmental authority; acts of God; earthquakes; fires; floods; wars; terrorism; civil or military disturbances; sabotage; epidemics; riots; interruptions, loss or malfunctions of utilities, computer (hardware or software) or communications service; accidents; labor disputes; acts of civil or military authority or governmental actions; or the unavailability of the Federal Reserve Bank wire or telex or other wire or communication facility.

(f) Any corporation or association into which WTNA may be converted or merged, or with which it may be consolidated, or to which it may sell or transfer all or substantially all of its corporate trust business and assets as a whole or substantially as a whole, or any corporation or association resulting from any such conversion, sale, merger, consolidation or transfer to which the Delaware Trustee is a party, will be and become the successor Delaware Trustee under this Agreement and will have and succeed to the rights, powers, duties, immunities and privileges as its predecessor, without the execution or filing of any instrument or paper or the performance of any further act.

ARTICLE IV. **THE OVERSIGHT BOARD**

4.1 Oversight Board Members. The Oversight Board will be comprised of five (5) Members appointed to serve as the board of managers of the Claimant Trust, at least two (2) of which shall be disinterested Members selected by the Creditors' Committee (such disinterested members, the "Disinterested Members"). The initial Members of the Oversight Board will be representatives of Acis, the Redeemer Committee, Meta-e Discovery, UBS, and David Pauker. David Pauker and Paul McVoy, the representative of Meta-e Discovery, shall serve as the initial Disinterested Board Members; provided, however, that if the Plan is confirmed with the Convenience Class or any other convenience class supported by the Creditors' Committee, Meta-

E Discovery and its representative will resign on the Effective Date or as soon as practicable thereafter and be replaced in accordance with Section 4.10 hereof..

4.2 Authority and Responsibilities.

(a) The Oversight Board shall, as and when requested by either of the Claimant Trustee and Litigation Trustee, or when the Members otherwise deem it to be appropriate or as is otherwise required under the Plan, the Confirmation Order, or this Agreement, consult with and advise the Claimant Trustee and Litigation Trustee as to the administration and management of the Claimant Trust and the Litigation Sub-Trust, as applicable, in accordance with the Plan, the Confirmation Order, this Agreement, and Litigation Sub-Trust Agreement (as applicable) and shall have the other responsibilities and powers as set forth herein. As set forth in the Plan, the Confirmation Order, and herein, the Oversight Board shall have the authority and responsibility to oversee, review, and govern the activities of the Claimant Trust, including the Litigation Sub-Trust, and the performance of the Claimant Trustee and Litigation Trustee, and shall have the authority to remove the Claimant Trustee in accordance with Section 3.8 hereof or the Litigation Trustee in accordance with the terms of the Litigation Sub-Trust Agreement; provided, however, that the Oversight Board may not direct either Claimant Trustee and Litigation Trustee to act inconsistently with their respective duties under this Agreement (including without limitation as set in Section 4.2(e) below), the Litigation Sub-Trust Agreement, the Plan, the Confirmation Order, or applicable law.

(b) The Oversight Board shall also (i) monitor and oversee the administration of the Claimant Trust and the Claimant Trustee's performance of his or her responsibilities under this Agreement, (ii) as more fully set forth in the Litigation Sub-Trust Agreement, approve funding to the Litigation Sub-Trust, monitor and oversee the administration of the Litigation Sub-Trust and the Litigation Trustee's performance of his responsibilities under the Litigation Sub-Trust Agreement, and (iii) perform such other tasks as are set forth herein, in the Litigation Sub-Trust Agreement, and in the Plan.

(c) The Claimant Trustee shall consult with and provide information to the Oversight Board in accordance with and pursuant to the terms of the Plan, the Confirmation Order, and this Agreement to enable the Oversight Board to meet its obligations hereunder.

(d) Notwithstanding any provision of this Agreement to the contrary, the Claimant Trustee shall not be required to (i) obtain the approval of any action by the Oversight Board to the extent that the Claimant Trustee, in good faith, reasonably determines, based on the advice of legal counsel, that such action is required to be taken by applicable law, the Plan, the Confirmation Order, or this Agreement or (ii) follow the directions of the Oversight Board to take any action the extent that the Claimant Trustee, in good faith, reasonably determines, based on the advice of legal counsel, that such action is prohibited by applicable law the Plan, the Confirmation Order, or this Agreement.

(e) Notwithstanding provision of this Agreement to the contrary, with respect to the activities of the Reorganized Debtor in its capacity as an investment adviser (and subsidiaries of the Reorganized Debtor that serve as general partner or in an equivalent capacity) to any Managed Funds, the Oversight Board shall not make investment decisions or otherwise participate

in the investment decision making process relating to any such Managed Funds, nor shall the Oversight Board or any member thereof serve as a fiduciary to any such Managed Funds. It is agreed and understood that investment decisions made by the Reorganized Debtor (or its subsidiary entities) with respect to Managed Funds shall be made by the Claimant Trustee in his capacity as an officer of the Reorganized Debtor and New GP LLC and/or such persons who serve as investment personnel of the Reorganized Debtor from time to time, and shall be subject to the fiduciary duties applicable to such entities and persons as investment adviser to such Managed Funds.

4.3 Fiduciary Duties. The Oversight Board (and each Member in its capacity as such) shall have fiduciary duties to the Claimant Trust Beneficiaries consistent with the fiduciary duties that the members of the Creditors' Committee have to unsecured creditors and shall exercise its responsibilities accordingly; provided, however, that the Oversight Board shall not owe fiduciary obligations to any Holders of Class A Limited Partnership Interests or Class B/C Limited Partnership Interests until such Holders become Claimant Trust Beneficiaries in accordance with Section 5.1(c) hereof; provided, further, that the Oversight Board shall not owe fiduciary obligations to a Holder of an Equity Trust Interest if such Holder is named as a defendant in any of the Causes of Action, including Estate Claims, in their capacities as such, it being the intent that the Oversight Board's fiduciary duties are to maximize the value of the Claimant Trust Assets, including the Causes of Action. In all circumstances, the Oversight Board shall act in the best interests of the Claimant Trust Beneficiaries and in furtherance of the purpose of the Claimant Trust. Notwithstanding anything to the contrary contained in this Agreement, the foregoing shall not eliminate the implied contractual covenant of good faith and fair dealing.

4.4 Meetings of the Oversight Board. Meetings of the Oversight Board are to be held as necessary to ensure the operation of the Claimant Trust but in no event less often than quarterly. Special meetings of the Oversight Board may be held whenever and wherever called for by the Claimant Trustee or any Member; provided, however, that notice of any such meeting shall be duly given in writing no less than 48 hours prior to such meeting (such notice requirement being subject to any waiver by the Members in the minutes, if any, or other transcript, if any, of proceedings of the Oversight Board). Unless the Oversight Board decides otherwise (which decision shall rest in the reasonable discretion of the Oversight Board), the Claimant Trustee, and each of the Claimant Trustee's designated advisors may, but are not required to, attend meetings of the Oversight Board.

4.5 Unanimous Written Consent. Any action required or permitted to be taken by the Oversight Board in a meeting may be taken without a meeting if the action is taken by unanimous written consents describing the actions taken, signed by all Members and recorded. If any Member informs the Claimant Trustee (via e-mail or otherwise) that he or she objects to the decision, determination, action, or inaction proposed to be made by unanimous written consent, the Claimant Trustee must use reasonable good faith efforts to schedule a meeting on the issue to be set within 48 hours of the request or as soon thereafter as possible on which all members of the Oversight Board are available in person or by telephone. Such decision, determination, action, or inaction must then be made pursuant to the meeting protocols set forth herein.

4.6 Manner of Acting.

(a) A quorum for the transaction of business at any meeting of the Oversight Board shall consist of at least three Members (including no less than one (1) Disinterested Member); provided that if the transaction of business at a meeting would constitute a direct or indirect conflict of interest for the Redeemer Committee, Acis, and/or UBS, at least two Disinterested Members must be present for there to be a quorum. Except as set otherwise forth herein, the majority vote of the Members present at a duly called meeting at which a quorum is present throughout shall be the act of the Oversight Board except as otherwise required by law or as provided in this Agreement. Any or all of the Members may participate in a regular or special meeting by, or conduct the meeting through the use of, conference telephone, video conference, or similar communications equipment by means of which all Persons participating in the meeting may hear each other, in which case any required notice of such meeting may generally describe the arrangements (rather than or in addition of the place) for the holding hereof. Any Member participating in a meeting by this means is deemed to be present in person at the meeting. Voting (including on negative notice) may be conducted by electronic mail or individual communications by the applicable Trustee and each Member.

(b) Any Member who is present and entitled to vote at a meeting of the Oversight Board when action is taken is deemed to have assented to the action taken, subject to the requisite vote of the Oversight Board, unless (i) such Member objects at the beginning of the meeting (or promptly upon his/her arrival) to holding or transacting business at the meeting; (ii) his/her dissent or abstention from the action taken is entered in the minutes of the meeting; or (iii) he/she delivers written notice (including by electronic or facsimile transmission) of his/her dissent or abstention to the Oversight Board before its adjournment. The right of dissent or abstention is not available to any Member of the Oversight Board who votes in favor of the action taken.

(c) Prior to a vote on any matter or issue or the taking of any action with respect to any matter or issue, each Member shall report to the Oversight Board any conflict of interest such Member has or may have with respect to the matter or issue at hand and fully disclose the nature of such conflict or potential conflict (including, without limitation, disclosing any and all financial or other pecuniary interests that such Member may have with respect to or in connection with such matter or issue, other than solely as a holder of Trust Interests). A Member who, with respect to a matter or issue, has or who may have a conflict of interest whereby such Member's interests are adverse to the interests of the Claimant Trust shall be deemed a "Conflicted Member" who shall not be entitled to vote or take part in any action with respect to such matter or issue. In the event of a Conflicted Member, the vote or action with respect to such matter or issue giving rise to such conflict shall be undertaken only by Members who are not Conflicted Members and, notwithstanding anything contained herein to the contrary, the affirmative vote of only a majority of the Members who are not Conflicted Members shall be required to approve of such matter or issue and the same shall be the act of the Oversight Board.

(d) Each of Acis, the Redeemer Committee, and UBS shall be deemed "Conflicted Members" with respect to any matter or issue related to or otherwise affecting any of their respective Claim(s) (a "Committee Member Claim Matter"). A unanimous vote of the Disinterested Members shall be required to approve of or otherwise take action with respect to any

Committee Member Claim Matter and, notwithstanding anything herein to the contrary, the same shall be the act of the Oversight Board.

4.7 Tenure of the Members of the Oversight Board. The authority of the Members of the Oversight Board will be effective as of the Effective Date and will remain and continue in full force and effect until the Claimant Trust is terminated in accordance with Article IX hereof. The Members of the Oversight Board will serve until such Member's successor is duly appointed or until such Member's earlier death or resignation pursuant to Section 4.8 below, or removal pursuant to Section 4.9 below.

4.8 Resignation. A Member of the Oversight Board may resign by giving prior written notice thereof to the Claimant Trustee and other Members. Such resignation shall become effective on the earlier to occur of (i) the day that is 90 days following the delivery of such notice, (ii) the appointment of a successor in accordance with Section 4.10 below, and (iii) such other date as may be agreed to by the Claimant Trustee and the non-resigning Members of the Oversight Board.

4.9 Removal. A majority of the Oversight Board may remove any Member for Cause or Disability. If any Committee Member has its Claim disallowed in its entirety the representative of such entity will immediately be removed as a Member without the requirement for a vote and a successor will be appointed in the manner set forth herein. Notwithstanding the foregoing, upon the termination of the Claimant Trust, any or all of the Members shall be deemed to have resigned.

4.10 Appointment of a Successor Member.

(a) In the event of a vacancy on the Oversight Board (whether by removal, death, or resignation), a new Member may be appointed to fill such position by the remaining Members acting unanimously; provided, however, that any vacancy resulting from the removal, resignation, or death of a Disinterested Member may only be filled by a disinterested Person unaffiliated with any Claimant or constituency in the Chapter 11 Case; provided, further, that if an individual serving as the representative of a Committee Member resigns from its role as representative, such resignation shall not be deemed resignation of the Committee Member itself and such Committee Member shall have the exclusive right to designate its replacement representative for the Oversight Board. The appointment of a successor Member will be further evidenced by the Claimant Trustee's filing with the Bankruptcy Court (to the extent a final decree has not been entered) and posting on the Claimant Trustee's website a notice of appointment, at the direction of the Oversight Board, which notice will include the name, address, and telephone number of the successor Member.

(b) Immediately upon the appointment of any successor Member, the successor Member shall assume all rights, powers, duties, authority, and privileges of a Member hereunder and such rights and privileges will be vested in and undertaken by the successor Member without any further act. A successor Member will not be liable personally for any act or omission of a predecessor Member.

(c) Every successor Member appointed hereunder shall execute, acknowledge, and deliver to the Claimant Trustee and other Members an instrument accepting the appointment

under this Agreement and agreeing to be bound thereto, and thereupon the successor Member without any further act, deed, or conveyance, shall become vested with all rights, powers, trusts, and duties of a Member hereunder.

4.11 Compensation and Reimbursement of Expenses. Unless determined by the Oversight Board, no Member shall be entitled to compensation in connection with his or her service to the Oversight Board; provided, however, that a Disinterested Member shall be compensated in a manner and amount initially set by the other Members and as thereafter amended from time to time by agreement between the Oversight Board and the Disinterested Member. Notwithstanding the foregoing, the Claimant Trustee will reimburse the Members for all reasonable and documented out-of-pocket expenses incurred by the Members in connection with the performance of their duties hereunder (which shall not include fees, costs, and expenses of legal counsel).

4.12 Confidentiality. Each Member shall, during the period that such Member serves as a Member under this Agreement and following the termination of this Agreement or following such Member's removal or resignation, hold strictly confidential and not use for personal gain any material, non-public information of or pertaining to any Person to which any of the Claimant Trust Assets relates or of which such Member has become aware in the Member's capacity as a Member ("Confidential Trust Information"), except as otherwise required by law. For the avoidance of doubt, a Member's Affiliates, employer, and employer's Affiliates (and collectively with such Persons' directors, officers, partners, principals and employees, "Member Affiliates") shall not be deemed to have received Confidential Trust Information solely due to the fact that a Member has received Confidential Trust Information in his or her capacity as a Member of the Oversight Board and to the extent that (a) a Member does not disclose any Confidential Trust Information to a Member Affiliate, (b) the business activities of such Member Affiliates are conducted without reference to, and without use of, Confidential Trust Information, and (c) no Member Affiliate is otherwise directed to take, or takes on behalf of a Member or Member Affiliate, any actions that are contrary to the terms of this Section 4.12.

ARTICLE V. **TRUST INTERESTS**

5.1 Claimant Trust Interests.

(a) General Unsecured Claim Trust Interests. On the date hereof, or on the date such Claim becomes Allowed under the Plan, the Claimant Trust shall issue General Unsecured Claim Trust Interests to Holders of Allowed Class 8 General Unsecured Claims (the "GUC Beneficiaries"). The Claimant Trustee shall allocate to each Holder of an Allowed Class 8 General Unsecured Claim a General Unsecured Claim Trust Interest equal to the ratio that the amount of each Holder's Allowed Class 8 Claim bears to the total amount of the Allowed Class 8 Claims. The General Unsecured Claim Trust Interests shall be entitled to distributions from the Claimant Trust Assets in accordance with the terms of the Plan and this Agreement.

(b) Subordinated Claim Trust Interests. On the date hereof, or on the date such Claim becomes Allowed under the Plan, the Claimant Trust shall issue Subordinated Claim Trust Interests to Holders of Class 9 Subordinated Claims (the "Subordinated Beneficiaries"). The

Claimant Trustee shall allocate to each Holder of an Allowed Class 9 Subordinated Claim a Subordinated Claim Trust Interest equal to the ratio that the amount of each Holder's Allowed Class 9 Claim bears to the total of amount of the Allowed Class 9. The Subordinated Trust Interests shall be subordinated in right and priority to the General Unsecured Claim Trust Interests. The Subordinated Beneficiaries shall only be entitled to distributions from the Claimant Trust Assets after each GUC Beneficiary has been repaid in full with applicable interest on account of such GUC Beneficiary's Allowed General Unsecured Claim, and all Disputed General Unsecured Claims have been resolved, in accordance with the terms of the Plan and this Agreement.

(c) Contingent Trust Interests. On the date hereof, or on the date such Interest becomes Allowed under the Plan, the Claimant Trust shall issue Contingent Interests to Holders of Allowed Class 10 Class B/C Limited Partnership Interests and Holders of Allowed Class 11 Class A Limited Partnership Interests (collectively, the "Equity Holders"). The Claimant Trustee shall allocate to each Holder of Allowed Class 10 Class B/C Limited Partnership Interests and each Holder of Allowed Class 11 Class A Limited Partnership Interests a Contingent Trust Interest equal to the ratio that the amount of each Holder's Allowed Class 10 or Class 11 Interest bears to the total amount of the Allowed Class 10 or Class 11 Interests, as applicable, under the Plan. Contingent Trust Interests shall not vest, and the Equity Holders shall not have any rights under this Agreement, unless and until the Claimant Trustee files with the Bankruptcy Court a certification that all GUC Beneficiaries have been paid indefeasibly in full, including, to the extent applicable, all accrued and unpaid post-petition interest consistent with the Plan and all Disputed Claims have been resolved (the "GUC Payment Certification"). Equity Holders will only be deemed "Beneficiaries" under this Agreement upon the filing of a GUC Payment Certification with the Bankruptcy Court, at which time the Contingent Trust Interests will vest and be deemed "Equity Trust Interests." The Equity Trust Interests shall be subordinated in right and priority to Subordinated Trust Interests, and distributions on account thereof shall only be made if and when Subordinated Beneficiaries have been repaid in full on account of such Subordinated Beneficiary's Allowed Subordinated Claim, in accordance with the terms of the Plan, the Confirmation Order, and this Agreement. The Equity Trust Interests distributed to Allowed Holders of Class A Limited Partnership Interests shall be subordinated to the Equity Trust Interests distributed to Allowed Holders of Class B/C Limited Partnership Interests.

5.2 Interests Beneficial Only. The ownership of the beneficial interests in the Claimant Trust shall not entitle the Claimant Trust Beneficiaries to any title in or to the Claimant Trust Assets (which title shall be vested in the Claimant Trust) or to any right to call for a partition or division of the Claimant Trust Assets or to require an accounting. No Claimant Trust Beneficiary shall have any governance right or other right to direct Claimant Trust activities.

5.3 Transferability of Trust Interests. No transfer, assignment, pledge, hypothecation, or other disposition of a Trust Interest may be effected until (i) such action is unanimously approved by the Oversight Board, (ii) the Claimant Trustee and Oversight Board have received such legal advice or other information that they, in their sole and absolute discretion, deem necessary to assure that any such disposition shall not cause the Claimant Trust to be subject to entity-level taxation for U.S. federal income tax purposes, and (iii) either (x) the Claimant Trustee and Oversight Board, acting unanimously, have received such legal advice or other information that they, in their sole and absolute discretion, deem necessary or appropriate to assure that any such disposition shall not (a) require the Claimant Trust to comply with the registration and/or

reporting requirements of the Securities Act, the Exchange Act, the TIA, or the Investment Company Act or (b) cause any adverse effect under the Investment Advisers Act, or (y) the Oversight Board, acting unanimously, has determined, in its sole and absolute discretion, to cause the Claimant Trust to become a public reporting company and/or make periodic reports under the Exchange Act (provided that it is not required to register under the Investment Company Act or register its securities under the Securities Act) to enable such disposition to be made. In the event that any such disposition is allowed, the Oversight Board and the Claimant Trustee may add such restrictions upon such disposition and other terms of this Agreement as are deemed necessary or appropriate by the Claimant Trustee, with the advice of counsel, to permit or facilitate such disposition under applicable securities and other laws.

5.4 Registry of Trust Interests.

(a) Registrar. The Claimant Trustee shall appoint a registrar, which may be the Claimant Trustee (the “Registrar”), for the purpose of recording ownership of the Trust Interests as provided herein. The Registrar, if other than the Claimant Trustee, shall be an institution or person acceptable to the Oversight Board. For its services hereunder, the Registrar, unless it is the Claimant Trustee, shall be entitled to receive reasonable compensation from the Claimant Trust as a Claimant Trust Expense.

(b) Trust Register. The Claimant Trustee shall cause to be kept at the office of the Registrar, or at such other place or places as shall be designated by the Registrar from time to time, a registry of the Claimant Trust Beneficiaries and the Equity Holders (the “Trust Register”), which shall be maintained pursuant to such reasonable regulations as the Claimant Trustee and the Registrar may prescribe.

(c) Access to Register by Beneficiaries. The Claimant Trust Beneficiaries and their duly authorized representatives shall have the right, upon reasonable prior written notice to the Claimant Trustee, and in accordance with reasonable regulations prescribed by the Claimant Trustee, to inspect and, at the expense of the Claimant Trust Beneficiary make copies of the Trust Register, in each case for a purpose reasonable and related to such Claimant Trust Beneficiary’s Trust Interest.

5.5 Exemption from Registration. The Parties hereto intend that the rights of the Claimant Trust Beneficiaries arising under this Claimant Trust shall not be “securities” under applicable laws, but none of the Parties represent or warrant that such rights shall not be securities or shall not be entitled to exemption from registration under the applicable securities laws. The Oversight Board, acting unanimously, and Claimant Trustee may amend this Agreement in accordance with Article IX hereof to make such changes as are deemed necessary or appropriate with the advice of counsel, to ensure that the Claimant Trust is not subject to registration and/or reporting requirements of the Securities Act, the Exchange Act, the TIA, or the Investment Company Act. The Trust Interests shall not have consent or voting rights or otherwise confer on the Claimant Trust Beneficiaries any rights similar to the rights of a shareholder of a corporation in respect of any actions taken or to be taken, or decisions made or to be made, by the Oversight Board and/or the Claimant Trustee under this Agreement.

5.6 Absolute Owners. The Claimant Trustee may deem and treat the Claimant Trust Beneficiary of record as determined pursuant to this Article 5 as the absolute owner of such Trust Interests for the purpose of receiving distributions and payment thereon or on account thereof and for all other purposes whatsoever.

5.7 Effect of Death, Incapacity, or Bankruptcy. The death, incapacity, or bankruptcy of any Claimant Trust Beneficiary during the term of the Claimant Trust shall not (i) entitle the representatives or creditors of the deceased Beneficiary to any additional rights under this Agreement, or (ii) otherwise affect the rights and obligations of any of other Claimant Trust Beneficiary under this Agreement.

5.8 Change of Address. Any Claimant Trust Beneficiary may, after the Effective Date, select an alternative distribution address by providing notice to the Claimant Trustee identifying such alternative distribution address. Such notification shall be effective only upon receipt by the Claimant Trustee. Absent actual receipt of such notice by the Claimant Trustee, the Claimant Trustee shall not recognize any such change of distribution address.

5.9 Standing. No Claimant Trust Beneficiary shall have standing to direct the Claimant Trustee to do or not to do any act or to institute any action or proceeding at law or in equity against any party upon or with respect to the Claimant Trust Assets. No Claimant Trust Beneficiary shall have any direct interest in or to any of the Claimant Trust Assets.

5.10 Limitations on Rights of Claimant Trust Beneficiaries.

(a) The Claimant Trust Beneficiaries shall have no rights other than those set forth in this Agreement, the Confirmation Order, or the Plan (including any Plan Supplement documents incorporated therein).

(b) In any action taken by a Claimant Trust Beneficiary against the Claimant Trust, a current or former Trustee, or a current or former Member, in their capacity as such, the prevailing party will be entitled to reimbursement of attorneys' fees and other costs; provided, however, that any fees and costs shall be borne by the Claimant Trust on behalf of any such Trustee or Member, as set forth herein.

(c) A Claimant Trust Beneficiary who brings any action against the Claimant Trust, a current or former Trustee, or a current or former Member, in their capacity as such, may be required by order of the Bankruptcy Court to post a bond ensuring that the full costs of a legal defense can be reimbursed. A request for such bond can be made by the Claimant Trust or by Claimant Trust Beneficiaries constituting in the aggregate at least 50% of the most senior class of Claimant Trust Interests.

(d) Any action brought by a Claimant Trust Beneficiary must be brought in the United States Bankruptcy Court for the Northern District of Texas. Claimant Trust Beneficiaries are deemed to have waived any right to a trial by jury

(e) The rights of Claimant Trust Beneficiaries to bring any action against the Claimant Trust, a current or former Trustee, or current or former Member, in their capacity as such, shall not survive the final distribution by the Claimant Trust.

ARTICLE VI.
DISTRIBUTIONS

6.1 Distributions.

(a) Notwithstanding anything to the contrary contained herein, the Claimant Trustee shall distribute to holders of Trust Interests at least annually the Cash on hand net of any amounts that (a) are reasonably necessary to maintain the value of the Claimant Trust Assets pending their monetization or other disposition during the term of the Claimant Trust, (b) are necessary to pay or reserve for reasonably incurred or anticipated Claimant Trust Expenses and any other expenses incurred by the Claimant Trust (including, but not limited to, any taxes imposed on or payable by the Claimant Trustee with respect to the Claimant Trust Assets), (c) are necessary to pay or reserve for the anticipated costs and expenses of the Litigation Sub-Trust, (d) are necessary to satisfy or reserve for other liabilities incurred or anticipated by the Claimant Trustee in accordance with the Plan and this Agreement (including, but not limited to, indemnification obligations and similar expenses in such amounts and for such period of time as the Claimant Trustee determines, in good faith, may be necessary and appropriate, which determination shall not be subject to consent of the Oversight Board, may not be modified without the express written consent of the Claimant Trustee, and shall survive termination of the Claimant Trustee), (e) are necessary to maintain the Disputed Claims Reserve, and (f) are necessary to pay Allowed Claims in Class 1 through Class 7. Notwithstanding anything to the contrary contained in this paragraph, the Claimant Trustee shall exercise reasonable efforts to make initial distributions within six months of the Effective Date, and the Oversight Board may not prevent such initial distributions unless upon a unanimous vote of the Oversight Board. The Claimant Trustee may otherwise distribute all Claimant Trust Assets on behalf of the Claimant Trust in accordance with this Agreement and the Plan at such time or times as the Claimant Trustee is directed by the Oversight Board.

(b) At the request of the Reorganized Debtor, subject in all respects to the provisions of this Agreement, the Claimant Trustee shall distribute Cash to the Reorganized Debtor, as Distribution Agent with respect to Claims in Class 1 through 7, sufficient to satisfy Allowed Claims in Class 1 through Class 7.

(c) All proceeds of Claimant Trust Assets shall be distributed in accordance with the Plan and this Agreement.

6.2 Manner of Payment or Distribution. All distributions made by the Claimant Trustee on behalf of the Claimant Trust to the Claimant Trust Beneficiaries shall be payable by the Claimant Trustee directly to the Claimant Trust Beneficiaries of record as of the twentieth (20th) day prior to the date scheduled for the distribution, unless such day is not a Business Day, then such date or the distribution shall be the following Business Day, but such distribution shall be deemed to have been completed as of the required date.

6.3 Delivery of Distributions. All distributions under this Agreement to any Claimant Trust Beneficiary shall be made, as applicable, at the address of such Claimant Trust Beneficiary (a) as set forth on the Schedules filed with the Bankruptcy Court or (b) on the books and records

of the Debtor or their agents, as applicable, unless the Claimant Trustee has been notified in writing of a change of address pursuant to Section 5.6 hereof.

6.4 Disputed Claims Reserves. There will be no distributions under this Agreement or the Plan on account of Disputed Claims pending Allowance. The Claimant Trustee will maintain a Disputed Claims Reserve as set forth in the Plan and will make distributions from the Disputed Claims Reserve as set forth in the Plan.

6.5 Undeliverable Distributions and Unclaimed Property. All undeliverable distributions and unclaimed property shall be treated in the manner set forth in the Plan.

6.6 De Minimis Distributions. Distributions with a value of less than \$100 will be treated in accordance with the Plan.

6.7 United States Claimant Trustee Fees and Reports. **After the Effective Date, the Claimant Trust shall pay as a Claimant Trust Expense, all fees incurred under 28 U.S.C. § 1930(a)(6) by reason of the Claimant Trust's disbursements until the Chapter 11 Case is closed. After the Effective Date, the Claimant Trust shall prepare and serve on the Office of the United States Trustee such quarterly disbursement reports for the Claimant Trust as required by the Office of the United States Trustee Office for as long as the Chapter 11 Case remains open.**

ARTICLE VII. **TAX MATTERS**

7.1 Tax Treatment and Tax Returns.

(a) It is intended for the initial transfer of the Claimant Trust Assets to the Claimant Trust to be treated as a grantor trust for federal income tax purposes (and foreign, state, and local income tax purposes where applicable) as if the Debtor transferred the Claimant Trust Assets (other than the amounts set aside in the Disputed Claim Reserve, if the Claimant Trustee makes the election described below) to the Claimant Trust Beneficiaries and then, immediately thereafter, the Claimant Trust Beneficiaries transferred the Claimant Trust Assets to the Claimant Trust. Consistent with such treatment, (i) it is intended that the Claimant Trust will be treated as a grantor trust for federal income tax purposes (and foreign, state, and local income tax purposes where applicable), (ii) it is intended that the Claimant Trust Beneficiaries will be treated as the grantors of the Claimant Trust and owners of their respective share of the Claimant Trust Assets for federal income tax purposes (and foreign, state, and local income tax purposes where applicable). The Claimant Trustee shall file all federal income tax returns (and foreign, state, and local income tax returns where applicable) for the Claimant Trust as a grantor trust pursuant to Treasury Regulation Section 1.671-4(a).

(b) The Claimant Trustee shall determine the fair market value of the Claimant Trust Assets as of the Effective Date and notify the applicable Beneficiaries of such valuation, and such valuation shall be used consistently by all parties for all federal income tax purposes.

(c) The Claimant Trustee may file an election pursuant to Treasury Regulation 1.468B-9(c) to treat the Disputed Claims Reserve as a disputed ownership fund, in which case the

Claimant Trustee will file federal income tax returns and pay taxes for the Disputed Claim Reserve as a separate taxable entity.

7.2 Withholding. The Claimant Trustee may withhold from any amount distributed from the Claimant Trust to any Claimant Trust Beneficiary such sum or sums as are required to be withheld under the income tax laws of the United States or of any state or political subdivision thereof. Any amounts withheld pursuant hereto shall be deemed to have been distributed to and received by the applicable Beneficiary. As a condition to receiving any distribution from the Claimant Trust, the Claimant Trustee may require that the Beneficiary provide such holder's taxpayer identification number and such other information and certification as may be deemed necessary for the Claimant Trustee to comply with applicable tax reporting and withholding laws. If a Beneficiary fails to comply with such a request within one year, such distribution shall be deemed an unclaimed distribution and treated in accordance with Section 6.5(b) of this Agreement.

ARTICLE VIII.

STANDARD OF CARE AND INDEMNIFICATION

8.1 Standard of Care. None of the Claimant Trustee, acting in his capacity as the Claimant Trustee or in any other capacity contemplated by this Agreement or the Plan, the Delaware Trustee, acting in its capacity as Delaware Trustee, the Oversight Board, or any current or any individual Member, solely in their capacity as Members of the Oversight Board, shall be personally liable to the Claimant Trust or to any Person (including any Claimant Trust Beneficiary) in connection with the affairs of the Claimant Trust, unless it is ultimately determined by order of the Bankruptcy Court or, if the Bankruptcy Court either declines to exercise jurisdiction over such action, or cannot exercise jurisdiction over such action, such other court of competent jurisdiction that the acts or omissions of any such Claimant Trustee, Delaware Trustee, Oversight Board, or Member constituted fraud, willful misconduct, or gross negligence. The employees, agents and professionals retained by the Claimant Trust, the Claimant Trustee, Delaware Trustee, Oversight Board, or individual Member shall not be personally liable to the Claimant Trust or any other Person in connection with the affairs of the Claimant Trust, unless it is ultimately determined by order of the Bankruptcy Court or, if the Bankruptcy Court either declines to exercise jurisdiction over such action, or cannot exercise jurisdiction over such action, such other court of competent jurisdiction that such acts or omissions by such employee, agent, or professional constituted willful fraud, willful misconduct or gross negligence. None of the Claimant Trustee, Delaware Trustee, Oversight Board, or any Member shall be personally liable to the Claimant Trust or to any Person for the acts or omissions of any employee, agent or professional of the Claimant Trust or Claimant Trustee taken or not taken in good faith reliance on the advice of professionals or, as applicable, with the approval of the Bankruptcy Court, unless it is ultimately determined by order of the Bankruptcy Court or, if the Bankruptcy Court either declines to exercise jurisdiction over such action, or cannot exercise jurisdiction over such action, such other court of competent jurisdiction that the Claimant Trustee, Delaware Trustee, Oversight Board, or Member acted with gross negligence or willful misconduct in the selection, retention, or supervision of such employee, agent or professional of the Claimant Trust.

8.2 Indemnification. The Claimant Trustee (including each former Claimant Trustee), WTNA in its individual capacity and as Delaware Trustee, the Oversight Board, and all past and present Members (collectively, in their capacities as such, the "Indemnified Parties") shall be

indemnified by the Claimant Trust against and held harmless by the Claimant Trust from any losses, claims, damages, liabilities or expenses (including, without limitation, attorneys' fees, disbursements, and related expenses) to which the Indemnified Parties may become subject in connection with any action, suit, proceeding or investigation brought or threatened against any of the Indemnified Parties in their capacity as Claimant Trustee, Delaware Trustee, Oversight Board, or Member, or in connection with any matter arising out of or related to the Plan, this Agreement, or the affairs of the Claimant Trust, unless it is ultimately determined by order of the Bankruptcy Court or other court of competent jurisdiction that the Indemnified Party's acts or omissions constituted willful fraud, willful misconduct, or gross negligence. If the Indemnified Party becomes involved in any action, proceeding, or investigation in connection with any matter arising out of or in connection with the Plan, this Agreement or the affairs of the Claimant Trust for which an indemnification obligation could arise, the Indemnified Party shall promptly notify the Claimant Trustee and/or Oversight Board, as applicable; provided, however, that the failure of an Indemnified Party to promptly notify the Claimant Trustee and/or Oversight Board of an indemnification obligation will not excuse the Claimant Trust from indemnifying the Indemnified Party unless such delay has caused the Claimant Trust material harm. The Claimant Trust shall pay, advance or otherwise reimburse on demand of an Indemnified Party the Indemnified Party's reasonable legal and other defense expenses (including, without limitation, the cost of any investigation and preparation and attorney fees, disbursements, and other expenses related to any claim that has been brought or threatened to be brought) incurred in connection therewith or in connection with enforcing his or her rights under this Section 8.2 as a Claimant Trust Expense, and the Claimant Trust shall not refuse to make any payments to the Indemnified Party on the assertion that the Indemnified Party engaged in willful misconduct or acted in bad faith; provided that the Indemnified Party shall be required to repay promptly to the Claimant Trust the amount of any such advanced or reimbursed expenses paid to the Indemnified Party to the extent that it shall be ultimately determined by Final Order that the Indemnified Party engaged in willful fraud, willful misconduct, or gross negligence in connection with the affairs of the Claimant Trust with respect to which such expenses were paid; provided, further, that any such repayment obligation shall be unsecured and interest free. The Claimant Trust shall indemnify and hold harmless the employees, agents and professionals of the Claimant Trust and Indemnified Parties to the same extent as provided in this Section 8.2 for the Indemnified Parties. For the avoidance of doubt, the provisions of this Section 8.2 shall remain available to any former Claimant Trustee, WTNA in its individual capacity and as Delaware Trustee, or Member or the estate of any decedent Claimant Trustee or Member, solely in their capacities as such. The indemnification provided hereby shall be a Claimant Trust Expense and shall not be deemed exclusive of any other rights to which the Indemnified Party may now or in the future be entitled to under the Plan or any applicable insurance policy. The failure of the Claimant Trust to pay or reimburse an Indemnified Party as required under this Section 8.2 shall constitute irreparable harm to the Indemnified Party and such Indemnified Party shall be entitled to specific performance of the obligations herein. The terms of this Section 8.2 shall survive the termination of this Agreement and the resignation or removal of any Indemnified Party.

8.3 No Personal Liability. Except as otherwise provided herein, neither of the Trustees nor Members of the Oversight Board shall be subject to any personal liability whatsoever, whether in tort, contract, or otherwise, to any Person in connection with the affairs of the Claimant Trust to the fullest extent provided under Section 3803 of the Delaware Statutory Trust Act, and all Persons asserting claims against the Claimant Trustee, Litigation Trustee, or any Members, or

otherwise asserting claims of any nature in connection with the affairs of the Claimant Trust, shall look solely to the Claimant Trust Assets for satisfaction of any such claims.

8.4 Other Protections. To the extent applicable and not otherwise addressed herein, the provisions and protections set forth in Article IX of the Plan will apply to the Claimant Trust, the Claimant Trustee, the Litigation Trustee, and the Members.

ARTICLE IX. **TERMINATION**

9.1 Duration. The Trustees, the Claimant Trust, and the Oversight Board shall be discharged or dissolved, as the case may be, at such time as: (a) the Litigation Trustee determines that the pursuit of Estate Claims is not likely to yield sufficient additional proceeds to justify further pursuit of such Estate Claims, (b) the Claimant Trustee determines that the pursuit of Causes of Action (other than Estate Claims) is not likely to yield sufficient additional proceeds to justify further pursuit of such Causes of Action, (c) the Claimant Trustee determines that the pursuit of sales of other Claimant Trust Assets is not likely to yield sufficient additional proceeds to justify further pursuit of such sales of Claimant Trust Assets, (d) all objections to Disputed Claims and Equity Interests are fully resolved, (e) the Reorganized Debtor is dissolved, and (f) all Distributions required to be made by the Claimant Trustee to the Claimant Trust Beneficiaries under the Plan have been made, but in no event shall the Claimant Trust be dissolved later than three years from the Effective Date unless the Bankruptcy Court, upon motion made within the six-month period before such third anniversary (and, in the event of further extension, by order of the Bankruptcy Court, upon motion made at least six months before the end of the preceding extension), determines that a fixed period extension (not to exceed two years, together with any prior extensions) is necessary to facilitate or complete the recovery on, and liquidation of, the Claimant Trust Assets.

9.2 Distributions in Kind. Upon dissolution of the Claimant Trust, any remaining Claimant Trust Assets that exceed the amounts required to be paid under the Plan will be transferred (in the sole discretion of the Claimant Trustee) in Cash or in-kind to the Holders of the Claimant Trust Interests as provided in the Claimant Trust Agreement.

9.3 Continuance of the Claimant Trustee for Winding Up. After dissolution of the Claimant Trust and for purpose of liquidating and winding up the affairs of the Claimant Trust, the Claimant Trustee shall continue to act as such until the Claimant Trustee's duties have been fully performed. Prior to the final distribution of all remaining Claimant Trust Assets, the Claimant Trustee shall be entitled to reserve from such assets any and all amounts required to provide for the Claimant Trustee's own costs and expenses, including a reserve to fund any potential indemnification or similar obligations of the Claimant Trust, until such time as the winding up of the Claimant Trust is completed. Upon the dissolution of the Claimant Trust and completion of the winding up of the assets, liabilities and affairs of the Claimant Trust pursuant to the Delaware Statutory Trust Act, the Claimant Trustee shall prepare, execute and file a certificate of cancellation with the State of Delaware to terminate the Claimant Trust pursuant to Section 3810 of the Delaware Statutory Trust Act (such date upon which the certificate of cancellation is filed shall be referred to as the "Termination Date"). If the Delaware Trustee's signature is required for purposes of filing such certificate of cancellation, the Claimant Trustee shall provide the Delaware

Trustee with written direction to execute such certificate of cancellation, and the Delaware Trustee shall be entitled to conclusively and exclusively rely upon such written direction without further inquiry. Upon the Termination date, the Claimant Trustee shall retain for a period of two (2) years, as a Claimant Trust Expense, the books, records, Claimant Trust Beneficiary lists, and certificated and other documents and files that have been delivered to or created by the Claimant Trustee. At the Claimant Trustee's discretion, all of such records and documents may, but need not, be destroyed at any time after two (2) years from the Termination Date.

9.4 Termination of Duties. Except as otherwise specifically provided herein, upon the Termination Date of the Claimant Trust, the Claimant Trustee, the Oversight Board and its Members shall have no further duties or obligations hereunder.

9.5 No Survival. The rights of Claimant Trust Beneficiaries hereunder shall not survive the Termination Date, provided that such Claimant Trust Beneficiaries are provided with notice of such Termination Date.

ARTICLE X. **AMENDMENTS AND WAIVER**

The Claimant Trustee, with the consent of a simple majority of the Oversight Board, may amend this Agreement to correct or clarify any non-material provisions. This Agreement may not otherwise be amended, supplemented, otherwise modified, or waived in any respect except by an instrument in writing signed by the Claimant Trustee and with the unanimous approval of the Oversight Board, and the approval of the Bankruptcy Court, after notice and a hearing; provided that the Claimant Trustee must provide the Oversight Board with prior written notice of any non-material amendments, supplements, modifications, or waivers of this Agreement. No amendment or waiver of this Agreement that adversely affects the Delaware Trustee shall be effective unless the Delaware Trustee has consented thereto in writing in its sole and absolute discretion.

ARTICLE XI. **MISCELLANEOUS**

11.1 Trust Irrevocable. Except as set forth in this Agreement, establishment of the Claimant Trust by this Agreement shall be irrevocable and shall not be subject to revocation, cancellation or rescission by the Claimant Trust Beneficiaries.

11.2 Bankruptcy of Claimant Trust Beneficiaries. The dissolution, termination, bankruptcy, insolvency or other similar incapacity of any Claimant Trust Beneficiary shall not permit any creditor, trustee, or any other Claimant Trust Beneficiary to obtain possession of, or exercise legal or equitable remedies with respect to, the Claimant Trust Assets.

11.3 Claimant Trust Beneficiaries have No Legal Title to Claimant Trust Assets. No Claimant Trust Beneficiary shall have legal title to any part of the Claimant Trust Assets.

11.4 Agreement for Benefit of Parties Only. Nothing herein, whether expressed or implied, shall be construed to give any Person other than the Claimant Trustee, Oversight Board, and the Claimant Trust Beneficiaries any legal or equitable right, remedy or claim under or in

respect of this Agreement. The Claimant Trust Assets shall be held for the sole and exclusive benefit of the Claimant Trust Beneficiaries.

11.5 Notices. All notices, directions, instructions, confirmations, consents and requests required or permitted by the terms hereof shall, unless otherwise specifically provided herein, be in writing and shall be sent by first class mail, facsimile, overnight mail or in the case of mailing to a non-United States address, air mail, postage prepaid, addressed to:

(a) If to the Claimant Trustee:

Claimant Trustee
c/o Highland Capital Management, L.P.
100 Crescent Court, Suite 1850
Dallas, Texas 75201

With a copy to:

Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd, 13th Floor
Los Angeles, CA 90067
Attn: Jeffrey Pomerantz (jpomerantz@pszjlaw.com)
Ira Kharasch (ikharasch@pszjlaw.com)
Gregory Demo (gdemo@pszjlaw.com)

(b) If to the Delaware Trustee:

Wilmington Trust, National Association
1100 North Market Street
Wilmington, DE 19890
Attn: Corporate Trust Administration/David Young
Email: nmarlett@wilmingtontrust.com
Phone: (302) 636-6728
Fax: (302) 636-4145

Notice mailed shall be effective on the date mailed or sent. Any Person may change the address at which it is to receive notices under this Agreement by furnishing written notice pursuant to the provisions of this Section 11.5 to the entity to be charged with knowledge of such change.

11.6 Severability. Any provision hereof which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provisions in another jurisdiction.

11.7 Counterparts. This Agreement may be executed by the parties hereto in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument.

11.8 Binding Effect, etc. All covenants and agreements contained herein shall be binding upon, and inure to the benefit of, the Claimant Trust, the Claimant Trustee, and the Claimant Trust Beneficiaries, and their respective successors and assigns. Any notice, direction, consent, waiver or other instrument or action by any Claimant Trust Beneficiary shall bind its successors and assigns.

11.9 Headings; References. The headings of the various Sections herein are for convenience of reference only and shall not define or limit any of the terms or provisions hereof.

11.10 Governing Law. This Agreement shall in all respects be governed by, and construed in accordance with the laws of the State of Delaware, including all matters of constructions, validity and performance.

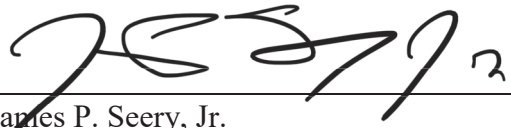
11.11 Consent to Jurisdiction. Each of the parties hereto, each Member (solely in their capacity as Members of the Oversight Board), and each Claimant Trust Beneficiary consents and submits to the exclusive jurisdiction of the Bankruptcy Court for any action or proceeding instituted for the enforcement and construction of any right, remedy, obligation, or liability arising under or by reason of this Agreement, the Plan or any act or omission of the Claimant Trustee (acting in his capacity as the Claimant Trustee or in any other capacity contemplated by this Agreement or the Plan), Litigation Trustee (acting in his capacity as the Litigation Trustee or in any other capacity contemplated by this Agreement or the Plan), the Oversight Board, or any individual Member (solely in their capacity as Members of the Oversight Board); *provided, however,* that if the Bankruptcy Court either declines to exercise jurisdiction over such action or cannot exercise jurisdiction over such action, such action may be brought in the state or federal courts located in the Northern District of Texas.

11.12 Transferee Liabilities. The Claimant Trust shall have no liability for, and the Claimant Trust Assets shall not be subject to, any claim arising by, through or under the Debtor except as expressly set forth in the Plan or in this Agreement. In no event shall the Claimant Trustee or the Claimant Trust Beneficiaries have any personal liability for such claims. If any liability shall be asserted against the Claimant Trust or the Claimant Trustee as the transferee of the Claimant Trust Assets on account of any claimed liability of, through or under the Debtor or Reorganized Debtor, the Claimant Trustee may use such part of the Claimant Trust Assets as may be necessary to contest any such claimed liability and to pay, compromise, settle or discharge same on terms reasonably satisfactory to the Claimant Trustee as a Claimant Trust Expense.


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IN WITNESS HEREOF, the parties hereto have caused this Claimant Trust Agreement to be duly executed by their respective officers thereunto duly authorized on the day and year first written above.

Highland Capital Management, L.P.

By: 
James P. Seery, Jr.
Chief Executive Officer and
Chief Restructuring Officer

Claimant Trustee

By: 
James P. Seery, Jr., not individually but
solely in his capacity as the Claimant Trustee

Wilmington Trust, National Association,
as Delaware Trustee

By: 
Name: Neumann Marlett
Title: Bank Officer

EXHIBIT 39

004562

**Minutes of the Meeting of the
Claimant Trust Oversight Board of the Highland Claimant Trust**

August 26, 2021

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Mr. Seery also presented the Board with an overview of his Incentive Compensation Program proposal which would include not only Mr. Seery but the current HCMLP team. (The

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terms and structure of the proposal had been previewed with the Board in prior operating models presented by Mr. Seery.) Mr. Seery reviewed the proposal and stated his view that the proposal was market based and was designed to align incentives between himself and the HCMLP team on the one hand and the Claimant Trust beneficiaries on the other. The Board asked questions regarding proposal and determined that is would consider the proposal and revert to Mr. Seery with a counter proposal.




Richard Katz



Michael Linn



Christopher Provost




EXHIBIT 40

004565

**Minutes of the Meeting of the
Claimant Trust Oversight Board of the Highland Claimant Trust**

August 30, 2021

[REDACTED]

[REDACTED]

In the notice of the meeting, HCMLP provided the Oversight Board with notice that the meeting would address (i) incentive based compensation for the Claimant Trustee and the HCMLP Team and [REDACTED]

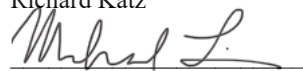
Mr. Katz began the meeting by walking the Oversight Board and Mr. Seery through the Oversight Board's counter-proposal to the HCMLP incentive compensation proposal, including the review of a spreadsheet and summary of the counter-proposal. Discussion was joined by Mr. Linn and Mr. Stern. Mr. Seery asked numerous questions and received detailed responses from the Oversight Board. Mr. Seery and the Oversight Board agreed to continue the discussion and negotiations regarding the proposed incentive compensation plan for the Claimant Trustee and the HCMLP.

[REDACTED]

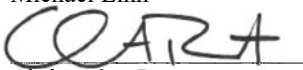
[REDACTED]



Richard Katz



Michael Linn



Christopher Provost

[REDACTED]

004566

EXHIBIT 41

004567

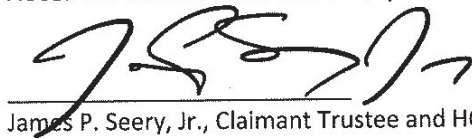
MEMORANDUM OF AGREEMENT

In accordance with the provisions of the Highland Claimant Trust Agreement and the Highland Capital Management, L.P. ("HCMLP") Plan of Reorganization, the Oversight Board of the Highland Claimant Trust and the Claimant Trustee/Chief Executive Officer of HCMLP engaged in robust, arm's-length and good faith negotiations regarding the incentive compensation program for the Claimant Trustee/CEO and the HCMLP post-effective date operating team ("HCMLP Team"). After considering various structures and incentives to motivate performance on behalf of the Claimant Trust, the parties reached the binding agreement reflected in the attached HCMLP and Claimant Trust Management Incentive Compensation Program (the "ICP") pdf document. A model entitled "ICP Nov 17 2021 Adjusted Dec 2 2021" summarizing potential ICP payments is also attached hereto.

The ICP is a detailed outline of the agreed program with Claimant Trust Expense compensation payments designed to assure the efficient and successful operation of the Claimant Trust and HCMLP for the benefit of the Claimant Trust and the Claimant Trust Beneficiaries. To the extent that there remain additional details regarding allocations (or other issues) to be determined in the future, the Oversight Board and the Claimant Trustee/CEO will negotiate in good faith the resolve those issues.

This Memorandum of Agreement is executed in accordance with the Claimant Trust Agreement (i) by Claimant Trustee executes this agreement on behalf of himself, the Claimant Trust and HCMLP and (ii) by the Oversight Board Members in their respective capacities as members of the Oversight Board

ACCEPTED AND AGREED this 6th day of December 2021.



James P. Seery, Jr., Claimant Trustee and HCMLP CEO

Oversight Board Members



Richard Katz. Independent Member

Jessup Holdings LLC



By: Christopher Provost
Authorized Signatory

Muck Holdings LLC



By: Michael Linn
Authorized Signatory

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FINAL

**MANAGEMENT INCENTIVE COMPENSATION AGREED TERMS
REORGANIZED HIGHLAND CAPITAL MANAGEMENT, L.P. and
HIGHLAND CLAIMANT TRUST, (the "Trust")
DECEMBER 2, 2021**

In accordance with the terms of the Claimant Trust Agreement in respect of compensation and severance for the Claimant Trustee, and consistent with the Claimant Trustee's management of the Reorganized Highland Capital Management, L.P. ("HCMLP") and its employees, the following term sheet contains the terms of the Incentive Compensation Program ("ICP") agreed to by the Oversight Board, the Claimant Trustee and HCMLP. Payments made under this ICP are Claimant Trust Expenses and compensation and reasonable expenses of administering the confirmed HCMLP Plan of Reorganization ("Plan").

1. Structure

- a. The ICP will have 5 Tiers based upon distribution to allowed Class 8 and Class 9 Claims. Incentive Payments will be based on actual cash reserved or distributed to holders of Allowed Class 8 and Class 9 Claims.
- b. The (i) Claimant Trustee/CEO and (ii) the HCMLP Team will each be indefeasibly allocated a percentage of the distributions reserved or made to Allowed Class 8 (principal and interest) and Class 9 Claims effective as of the date hereof. [REDACTED]

- c. Timing of payments to the Claimant Trustee/CEO and the HCMLP Team TBD. However, the purpose of the program is to incentivize performance and promote retention. Accordingly, allocations and distributions are not expected to occur until significant progress is made on the monetizations contemplated by the Plan.

d. Assumed Allowed Claim Amounts

1. Class 8 Principal	\$295,326,201
2. Class 8 Interest (thru 12/22)	\$9,676,000
3. Class 9 (assumes Daugherty settlement)	\$98,750,000

e. Incentive Payment Tiers

- i. Tier 1 \$200,000,000 to \$210,000,000 (approx. 68% to 71% Class 8)
- ii. Tier 2 \$210,000,001 to \$266,000,000 (approx. 71.1% to 90% Class 8)
- iii. Tier 3 \$266,000,001 to \$305,000,000 (approx. 90.1% to 103% Class 8)
- iv. Tier 4 \$305,000,001 to \$354,000,000 (approx. 50% Class 9)
- v. Tier 5 \$354,000,001 to 100% Class 9 Payout (> 50% Class 9)

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Doc 3784-43
Document Ex 2

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Desc
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f. Tier Payment Percentages

	Claimant Trustee/CEO	
Tier 1	.72%	
Tier 2	1.17%	
Tier 3	2.75%	
Tier 4	4.25%	
Tier 5	6.000%	

25. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

26. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

27. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

h. Base Salary

- i. As set for the in the Claimant Trust Agreement, Claimant Trustee/CEO will continue to receive his current base salary of \$150,000 per month (the "Base Salary"), less the actual cost of health insurance benefits provided to the Claimant Trustee/CEO.
- ii. Claimant Trustee/CEO and Oversight Board agree that the Base Salary will reset to \$75,000.00 per month starting 12/31/22, it being understood that Claimant Trustee/CEO and Oversight Board will negotiate in good faith to the extent a different Base Salary makes sense based on the scope of remaining assets and ongoing litigation for the Trust as needed for the periods from 12/31/22 to the end of the Trust. To that end, Claimant Trustee/CEO and Oversight Board agree to re-evaluate the Base Salary at least every 6m starting 12/31/22.
- iii. Claimant Trustee/CEO to receive a cash payment of \$1,000,000.00 and the Claimant Trustee/CEO ICP in the event of severance without cause, it being understood that if severance occurs during the period of 7/1/22 to 12/31/22, the cash payment portion will be the continuation of Base Salary until 12/31/22.

iv. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

FINAL

[REDACTED]

2. General Terms

- a. [REDACTED]
- b. [REDACTED]
- c. [REDACTED]
- d. Claimant Trustee/CEO is permitted to shift a portion of his ICP payments to HCMLP Team members at his sole discretion.
- e. It is the intent of the parties to make distributions from the Claimant Trust on a net basis, including the calculation of ICP so that payments under the ICP are treated as Claimant Trust Expenses and other reasonable costs of compensation and expenses. The ICP payments are not Claimant Trust distributions. For example, if a 1% share is owed on a \$100mm distribution, the Trust would need have \$101mm of cash for distribution so that \$1mm would go to the ICP and the balance to the Claimant Trust beneficiaries (holders of Class 8 and Class 9 Claims).
- f. The amounts of ICP entitlement, based on the tiers above in 1e and 1f, are anchored to 12/31/22 claim distributions; an 8% discount rate (annual rate, quarterly compounding) will apply to any distribution based on deviation from 12/31/22. For example, if a \$1mm distribution is made on 12/31/23, such distribution will be treated for ICP calculation purposes as the equivalent of \$924k on 12/31/22; analogously, if a \$1mm distribution is made 6/30/22, such amount will be treated as the equivalent of \$1.04mm on 12/31/22. Such time value adjustments will be done on a distribution-by-distribution basis.
- g. 20% of the Claimant Trustee/CEO ICP will be based on the successful achievement of the following goals, as determined by the Oversight Board :
 - i. Claimant Trustee/CEO to monitor and manage costs appropriately
 - ii. Claimant Trustee/CEO to manage and retain HCMLP Team appropriately
 - iii. Claimant Trustee/CEO to report to the Oversight Board on a timely basis all relevant information regarding the Claimant Trust.

-END-

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ICP Proposals Comparison

Class B Principal	295,326,201		
Class B Interest (through YE '22)	9,676,000		
Total Class B Claim	305,002,201		
Class D Principal	98,750,000		
Total Class B+D Claims	403,752,201		
		Sub claims breakdown	
		UBS	60.00
		Harbourvest	35.00
		Daugherty	3.75
		Total	98.75

Seery Proposal 1

Distributions Gross		To Jim Seery (was not broken out in original proposal)			
\$	% Recovery	on	% incre.	\$ incre.	% cumul.
209,681,603	71.00%	Class B Prin.	0.72%	1,500,000	0.72%
295,793,581	90.00%	Class B Prin.	1.17%	1,000,000	0.81%
295,326,201	100.00%	Class B Prin.	4.27%	4,000,000	1.67%

Overnight Board Proposal 1

Distributions Gross		To Jim Seery			
\$	% Recovery	on	% incre.	\$ incre.	% cumul.
209,681,603	71.00%	Class B Prin.	0.72%	1,500,000	0.72%
295,326,201	100.00%	Class B Prin.	1.17%	1,000,000	0.81%
388,939,701	85.00%	Class D Prin.	20.00%	4,000,000	1.67%

Seery Proposal 2

Distributions Gross		To Jim Seery			
\$	% Recovery	on	% incre.	\$ incre.	% cumul.
210,000,000	71.11%	Class B Prin.	0.72%	1,512,000	0.72%
266,000,000	90.02%	Class B Prin.	1.17%	695,200	0.81%
305,000,000	103.28%	Class B Prin.	3.50%	1,355,000	1.15%
354,000,000	49.62%	Class D Prin.	6.00%	2,450,000	1.69%

Overnight Board Proposal 2

Distributions Gross		To Jim Seery			
\$	% Recovery	on	% incre.	\$ incre.	% cumul.
210,000,000	71.11%	Class B Prin.	0.72%	1,512,000	0.72%
266,000,000	90.09%	Class B Prin.	1.17%	655,200	0.81%
305,000,000	103.28%	Class B Prin.	2.73%	1,072,500	1.06%
354,000,000	49.62%	Class D Prin.	4.23%	2,082,500	1.50%

Proposal Comparisons

	210,000,000	266,000,000	305,000,000	354,000,000	388,939,701	403,752,201
Gross distribution						
% on Class B Prin.	71.11%	90.07%	103.28%	119.87%	131.20%	136.71%
% on Class B Prin. + Int.	68.85%	87.21%	100.00%	116.06%	127.52%	132.38%
% on Class D Prin.	0.00%	0.00%	0.00%	49.62%	85.00%	100.00%

Seery Proposal 1

% cumul. to Jim Seery	0.72%	0.81%	0.96%	1.41%	1.67%	2.34%
\$ cumul. to Jim Seery	1,503,718	2,157,583	2,913,251	5,007,066	6,500,000	9,467,500

Overnight Board Proposal 1

% cumul. to Jim Seery	0.72%	0.81%	0.96%	1.41%	1.67%	2.34%
\$ cumul. to Jim Seery	1,503,718	2,157,583	2,913,251	5,007,066	6,500,000	9,467,500

% cumul. to Jim Seery	0.72%	0.81%	1.15%	1.69%	2.08%	2.22%
\$ cumul. to Jim Seery	1,512,000	2,167,200	3,532,200	5,982,200	8,078,582	8,967,332

Overnight Board Proposal 2

% cumul. to Jim Seery	0.72%	0.81%	1.06%	1.50%	1.81%	2.06%
\$ cumul. to Jim Seery	1,512,000	2,167,200	3,239,700	5,322,200	7,418,582	8,907,332
x of 2 yrs salary	3,000,000	0.4x	0.6x	0.3x	1.5x	2.1x

EXHIBIT 42

004573

ASSIGNMENT AGREEMENT

This Assignment Agreement, effective as of August 11, 2021 (this “Agreement”), is being entered by and among the Highland Claimant Trust (the “Claimant Trust”) and the Highland Litigation Sub-Trust (the “Litigation Sub-Trust”) for the transfer and assignment of certain claims and causes of action.

RECITALS

WHEREAS, on October 16, 2019, Highland Capital Management, L.P. (the “Debtor”) filed with the United States Bankruptcy Court for the District of Delaware, a voluntary petition for relief under chapter 11 of the Bankruptcy Code, which case was subsequently transferred to the Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Bankruptcy Court”) and captioned *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj11 (the “Chapter 11 Case”);

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Docket No. 1808] (as may be amended, supplemented, or otherwise modified from time to time, the “Plan”),¹ which was confirmed by the Bankruptcy Court on February 22, 2021, pursuant to the *Findings of Fact and Order Confirming Plan of Reorganization for the Debtor* [Docket No. 1943] (the “Confirmation Order”);

WHEREAS, on August 11, 2021, the Effective Date of the Plan occurred [Docket No. 2700] and, pursuant to the Plan, the Claimant Trust and the Litigation Sub-Trust subsequently came into existence;

WHEREAS, pursuant to the Plan, the Causes of Action were vested in the Claimant Trust and the Estate Claims that were Causes of Action were transferred from the Claimant Trust to the Litigation Sub-Trust;

WHEREAS, the purpose of the Litigation Sub-Trust is to investigate, prosecute, settle, or otherwise resolve claims and causes of action for the benefit of the Claimant Trust Beneficiaries;

WHEREAS, pursuant to Section 2.6 of the Litigation Sub-Trust Agreement, the Claimant Trustee shall, upon reasonable request of the Litigation Trustee, execute, acknowledge and deliver such further instruments and do such further acts as may be necessary or proper to transfer to the Litigation Trustee any portion of the Claimant Trust Assets intended to be conveyed by the Litigation Sub-Trust Agreement and in the Plan;

WHEREAS, the Litigation Trustee, at the direction of the Claimant Trust Oversight Committee, has requested that the Claimant Trustee assign to the Litigation Sub-Trust all Causes of Action not otherwise held by the Litigation Sub-Trust to the Litigation Sub-Trust, other than those Causes of Action that (1) the Claimant Trustee is currently pursuing, and (2) the Claimant Trustee intends to pursue on behalf of entities managed by the Reorganized Debtor (together, the “

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan.

Claimant Trust Causes of Action”).

AGREEMENT

In furtherance of the Plan and for good and valuable consideration, the sufficiency of which is hereby acknowledged, the Claimant Trust hereby irrevocably transfers and assigns to the Litigation Sub-Trust any and all Causes of Action not previously transferred or assigned by operation of the Plan, the Litigation Sub-Trust Agreement, or otherwise, except for the Claimant Trust Causes of Action, effective as of the date below. For the avoidance of doubt, to the extent not already held by the Litigation Sub-Trust, all Causes of Action that will be included in the Litigation Trustee’s complaint filed on or before October 15, 2021 are assigned to the Litigation Sub-Trust.

Executed as of October 8, 2021

Claimant Trust

By: 

James P. Seery, Jr., not individually but solely in his capacity as the Claimant Trustee

Litigation Sub-Trust

By: 

Marc Kirschner, not individually but solely in his capacity as the Litigation Trustee

EXHIBIT 43

004576

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) April 24, 2023
) 1:30 p.m. Docket
Reorganized Debtor.)
) - DUGABOY INVESTMENT TRUST AND
) HUNTER MOUNTAIN INVESTMENT
) TRUST'S MOTION FOR LEAVE TO
) FILE PROCEEDING (3662)
) - STATUS CONFERENCE RE: MOTION
) FOR LEAVE TO FILE VERIFIED
) ADVERSARY PROCEEDING FILED
) BY CREDITOR HUNTER MOUNTAIN
) INVESTMENT TRUST (3699)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

For the Reorganized Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For The Dugaboy Investment Trust, et al.:	Deborah Rose Deitsch-Perez STINSON, LLP 2200 Ross Avenue, Suite 2900 Dallas, TX 75201 (214) 560-2201
For Hunter Mountain Investment Trust:	Sawnie A. McEntire PARSONS MCENTIRE MCCLEARY, PLLC 1700 Pacific Avenue, Suite 4400 Dallas, TX 75201
For Hunter Mountain Investment Trust:	Roger L. McCleary PARSONS MCENTIRE MCCLEARY, PLLC One Riverway, Suite 1800 Houston, TX 77056 (713) 960-7305

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1 WEBEX APPEARANCES, cont'd.:

2 For Muck Holdings, et al.: Brent Ryan McIlwain
3 HOLLAND & KNIGHT, LLP
4 300 Crescent Court, Suite 1100
5 Dallas, TX 75201
6 (214) 964-9481

7 For James P. Seery, Jr.: Mark Stancil
8 Joshua Seth Levy
9 WILLKIE FARR & GALLAGHER, LLP
10 1875 K Street, NW
11 Washington, DC 20006
12 (202) 303-1133

13 For James P. Seery, Jr.: Omar Jesus Alaniz
14 REED SMITH
15 2850 N. Harwood Street, Suite 1500
16 Dallas, TX 75201
17 (469) 680-4292

18 Recorded by: Michael F. Edmond, Sr.
19 UNITED STATES BANKRUPTCY COURT
20 1100 Commerce Street, 12th Floor
21 Dallas, TX 75242
22 (214) 753-2062

23 Transcribed by: Kathy Rehling
24 311 Paradise Cove
25 Shady Shores, TX 76208
(972) 786-3063

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

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1 DALLAS, TEXAS - APRIL 24, 2023 - 1:39 P.M.

2 THE COURT: I will now turn to our Highland matters.
3 We have two of them. The first one we had scheduled I think
4 may have been worked out, but it is the Dugaboy and Hunter
5 Mountain adversary proceeding -- or, well, not adversary
6 proceeding, a motion for leave to file an adversary proceeding
7 regarding valuation. This is Case No. 19-34054.

8 Who do we have appearing for the Movant this afternoon?

9 MS. DEITSCH-PEREZ: Good morning, Your Honor. This
10 is Deborah Deitsch-Perez from Stinson for the Movants.

11 THE COURT: All right. Thank you. Do we have you
12 representing both Movants, Ms. Deitsch-Perez?

13 MS. DEITSCH-PEREZ: That's correct.

14 THE COURT: All right. Mr. Morris, I see you have
15 your video turned on. You're representing the Debtor today,
16 or Reorganized Debtor; is that correct?

17 MR. MORRIS: Yes, Your Honor. Good afternoon.

18 THE COURT: Good afternoon.

19 Do we have any other appearances on this matter?

20 All right. Well, am I correct you've worked out something
21 procedurally on this?

22 MS. DEITSCH-PEREZ: Yeah, let me report. We have
23 been negotiating over several weeks about information to be
24 provided to the Movants, and additional information was indeed
25 provided on Friday. I don't know if you've noticed, but the

1 reports have an additional section with some additional
2 information.

3 We're going through it. We think there are probably still
4 some -- some additional information that we need, and so we
5 will first reach out to Mr. Morris and attempt to negotiate
6 over that information. And if we are successful, wonderful.
7 If we are unsuccessful, because the Debtor has agreed that a
8 gatekeeper motion is not necessary since the adversary would
9 just be seeking a valuation and not monetary or other relief,
10 we will then proceed to -- if we cannot work things out with
11 the Debtor, we'll proceed to file an adversary, which will be
12 slightly different than the one that was attached to the
13 gatekeeper motion because we will explain what additional
14 information is needed and why the information we have is not
15 sufficient. So it should narrow the scope of the adversary.

16 THE COURT: All right. Thank you. Mr. Morris,
17 anything you want to add??

18 MR. MORRIS: Yes, just briefly, Your Honor. The
19 Reorganized Debtor does not believe Hunter Mountain or Dugaboy
20 is entitled to any information whatsoever. They certainly
21 have no legal right to the information. It's why they have to
22 pursue equitable -- an equitable claim. Not an equitable
23 right, but an equitable claim.

24 Counsel is certainly correct that we negotiated in good
25 faith to try to provide the information that the Reorganized

1 Debtors believed was -- might be useful to the extent that
2 someone was really interested in settling the case. We were
3 unable to come to an agreement. So, under Mr. Seery's
4 leadership, we acted unilaterally. We produced a wealth of
5 information on Friday night, including claims data, cash, cash
6 in reserve, cash in the Claimant Trust, assets, general
7 descriptions of assets that remain.

8 If they want to pursue a lawsuit, we'll accept service,
9 with the proviso that we set forth in our opposition to the
10 original motion, and that is everybody will be held
11 accountable for unsupported and unsubstantiated allegations.

12 But the ball is in their court. We have produced what
13 we're prepared to produce. If they want to continue with
14 litigation, I guess that's what we'll do.

15 MS. DEITSCH-PEREZ: Well, we hope that the Debtor
16 will continue to negotiate and will hear why we explain --
17 when we explain why the information isn't enough. So, ever
18 the optimist, I hold out some hope that we will be able to do
19 this, if not through this proceeding, through the motion for a
20 greater stay and for mediation that's also before Your Honor.

21 So, one way or the other, we do hope to resolve this. If
22 we can't, we will bring the adversary. And I thank you, Mr.
23 Morris, for agreeing to accept service.

24 THE COURT: All right. Just a procedural question.
25 Ms. Deitsch-Perez, will you be actually withdrawing this

1 motion for leave, or are you all doing some sort of order
2 setting forth what you've all agreed to and announced? Just
3 let me know, so I know what to be expecting.

4 MS. DEITSCH-PEREZ: I think we will try to have an
5 agreed order to enforce what we're doing. If we fail in that,
6 I don't suppose it matters very much. We can withdraw the
7 application and just proceed to file the adversary. I'd
8 rather get an agreed order up, though, setting forth that the
9 Debtor has agreed that a gatekeeper is not necessary and that,
10 as a result, we'll be filing the adversary. So, that's what I
11 hope, Your Honor, we'll get.

12 THE COURT: All right. Well, just for the record, it
13 doesn't really matter to me whether you withdraw it or I have
14 an agreed order. I'm just trying to simplify life. I know
15 sometimes the Clerk's Office personnel will reach out -- we
16 need an order, we need an order, we need an order -- if
17 there's a motion pending that doesn't have an order to match
18 to it, and I'm just trying to avoid headaches in that regard.

19 MS. DEITSCH-PEREZ: That's why we'll make it clear
20 what we do one way or the other.

21 THE COURT: Very good.

22 MR. MORRIS: Your Honor, just for the Court's
23 convenience, I apologize that I don't have the docket numbers,
24 but the information that we posted and we intended to and did
25 post it on the docket so that it was available to everybody

1 equally, it's at the back of the two quarterly operating
2 reports. There's one filed on behalf of the Reorganized
3 Debtor and then there's one filed on behalf of the Claimant
4 Trust. But I believe the information in the back of each of
5 those reports is the same.

6 So, just in case the Court has any curiosity about what
7 we've disclosed, I just wanted to make sure Your Honor knew
8 where to find it.

9 THE COURT: Okay. I've got the docket right in front
10 of me, and I see on Friday Docket No. 3756 was filed by the
11 Reorganized Debtor, Post-Confirmation Report, and then Docket
12 3757 was filed by the Claimant Trust. So, thank you. I've
13 noted those if we want to go back and look.

14 All right. Well, that concludes this Dugaboy/Hunter Trust
15 motion for leave.

16 Let's now turn to the other Hunter Mountain motion for
17 leave. We have a status conference -- I think it's a hearing
18 on what kind of hearing we're going to have -- on Docket Entry
19 No. 3699. So we probably have a larger appearance list on
20 this one, so I'll do roll call.

21 Appearing for Hunter Mountain, who do we have?

22 MR. MCENTIRE: Good afternoon, Your Honor. This is
23 Sawnie McEntire and my partner Roger McCleary with Parsons
24 McEntire McCleary representing Hunter Mountain.

25 THE COURT: Okay. Now I'm going to just do a roll

1 call. For the Reorganized Debtor, Mr. Morris, will you be
2 taking the lead on that?

3 MR. MORRIS: Yes, I will, Your Honor. Good
4 afternoon.

5 THE COURT: Good afternoon.

6 All right. We have four, potentially, named Claims
7 Purchasers. So I'll ask, who do we have representing Muck
8 Holdings?

9 MR. MCILWAIN: Your Honor, Brent McIlwain here from
10 Holland & Knight. I represent Farallon Capital Management,
11 Stonehill Capital Management, Muck Holdings, and Jessup
12 Holdings, LLC.

13 THE COURT: Okay. So you represent all four of the
14 Claims Purchasers?

15 MR. MCILWAIN: That's correct, Your Honor.

16 THE COURT: All right. James Seery is a potential
17 Defendant identified. Who do we have representing Mr. Seery?

18 MR. STANCIL: Good afternoon, Your Honor. This is
19 Mark Stancil from Willkie Farr & Gallagher. I'm joined by my
20 colleague Josh Levy and our co-counsel from Reed Smith, Omar
21 Alaniz.

22 THE COURT: All right. Thank you.

23 Do we have any other lawyers appearing in this?

24 MR. STANCIL: I think that's it, Your Honor.

25 THE COURT: All right. Well, so, again, I think

1 we're having a hearing on what kind of hearing we're going to
2 have on your motion for leave, Mr. McEntire. What did you
3 want to say?

4 MR. MCENTIRE: Well, that's correct, Your Honor.
5 Good afternoon again.

6 I think there are several issues before the Court during
7 this status conference. One is the date of the hearing. I
8 think we certainly preliminarily had agreed over the last 10
9 days that May 18 was the logical date in light of the motion
10 practice.

11 The length of the hearing, Mr. Morris has suggested over
12 four hours or approximately four hours. I've suggested one
13 and a half hours.

14 And then there is an issue about whether or not evidence
15 should be allowed.

16 There is a fourth issue that I just want to make sure that
17 the Court is aware. I don't want to be accused of waiting
18 this issue as the proceedings progress. And that is we have
19 raised an issue about Mr. Morris's representation and whether
20 he has a conflict of interest. We did this in writing in our
21 reply brief several weeks ago. As a consequence, Mr. Seery
22 now has new counsel, Mr. Morris of course to represent the
23 Highland parties, the Reorganized Debtor and the Claimant --
24 the Highland Claimant Trust. We are concerned that he has a
25 conflict of interest. It is unclear from whom he is taking

1 his direction or from whom he is deriving his authority.

2 And equally important if not more important, he is taking
3 positions that are inconsistent with the best interests of the
4 Reorganized Debtor and the Claimant Trust.

5 I don't think this is the type of issue that could be
6 resolved today. However, I want to make sure it's on the
7 record so I'm not accused of waiting as we proceed. But
8 otherwise, it's the date of the hearing, the length of the
9 hearing, and whether or not evidence is allowed.

10 I'm prepared to address the merits of our thoughts on each
11 of those last three -- the date, the length, and the evidence
12 issues -- if the Court wishes, or I could wait until after
13 other counsel have made their comments. But I'm prepared to
14 move forward as the Court wishes.

15 THE COURT: All right. Well, I am not going to
16 address a conflicts of interest issue today. I think I heard
17 you saying you don't anticipate the Court would. But I don't
18 have any sort of pleading in front of me on that, so we'll
19 just make that clear from the get-go.

20 One of the reasons I'm making that clear from the get-go
21 is I have not read the brief you filed I don't know what time
22 on Friday, **Docket No. 3758**, Mr. McEntire. And then I see an
23 objection you filed Friday, **Docket No. 3761**. And then last
24 night at 9:30 a supplemental support document. I take it none
25 of --

1 MR. MCENTIRE: Right.

2 THE COURT: -- these issues raised the conflict of
3 interest issue.

4 MR. MCENTIRE: We addressed the conflicts of issues
5 in -- certainly in our filing last night. But the brief on
6 Friday and the objection on Friday is addressing the Court's
7 email and Mr. Morris's request to hold an evidentiary hearing.
8 And we oppose that. We object to the conduct of an
9 evidentiary hearing. And the brief that we filed -- the
10 objection we filed was supported by case law. I've seen
11 nothing from Mr. Morris or any of the other counsel in the
12 case responding to our objection or the cases we've cited.

13 But Your Honor, if you wish, I could just move forward
14 right now and address the evidentiary issue, if you wish.

15 THE COURT: All right. Well, I'm backing up. This
16 shows 9:10 a.m. this morning, the 3761. Am I on the wrong
17 thing?

18 MR. MCENTIRE: I think you're -- what we did this
19 morning at Mr. Morris's request is we sent in a redline
20 version of the revised complaint to the Court's attention.
21 The actual revised complaint was filed last night, and all
22 that was done this morning was, at Mr. Morris's request, to
23 facilitate his review of the new complaint, was to redline it.

24 THE COURT: All right. Well, and then, okay, the
25 brief you filed was at 4:55 p.m. Friday.

1 MR. MCENTIRE: Yes, ma'am.

2 THE COURT: I can assure you, we were still all
3 working then, but unless you notify my courtroom deputy that
4 you have filed something sort of on the eve of a hearing,
5 we're not necessarily in chambers going to go back and scroll
6 the docket. We had court on other matters this morning, so we
7 were focused on that. I've not seen your brief. But anyway,
8 you can argue obviously what you want to argue.

9 Okay. So let's talk about -- I think you wanted to talk
10 about evidence first.

11 MR. MCENTIRE: Yes, ma'am.

12 THE COURT: So I'm happy to hear about that topic
13 first. Because, obviously, the other issues -- length of
14 hearing, date of hearing -- hinge on that. So what do you --

15 MR. MCENTIRE: I agree.

16 THE COURT: What do you say about this?

17 MR. MCENTIRE: All right. Well, earlier, I think,
18 last week, or perhaps it was the end of the previous week, Mr.
19 Morris had issued an email requesting a four-hour hearing
20 because he wanted to cross-examine Mr. Dondero and otherwise
21 have a full-blown evidentiary hearing. Opening statements,
22 final argument, and witness examinations.

23 We responded immediately by email objecting to the
24 evidentiary format. There was a series of exchanges between
25 my office, Mr. Morris's office, and your chambers, Your Honor,

1 where Ms. Ellison indicated that you were initially inclined
2 to grant an evidentiary hearing.

3 That was followed by an email on April 19th of last week
4 where you suggested in your email that the issue of
5 colorability, which is really the gatekeeper function that the
6 Court's serving, as the Court is aware, that the standard for
7 colorability was somehow greater than the standard for
8 plausibility under a 12(b)(6) motion.

9 In the email, Ms. Ellison suggested that it was perhaps
10 the Court's initial thinking that there was a higher hurdle
11 associated with the gatekeeping function than a traditional
12 12(b)(6) inquiry.

13 We have done substantial research following that email
14 exchange, and I will also point out to the Court we actually
15 briefed the 12(b)(6) standard in our original emergency motion
16 for leave. So this is not new to us. We had actually briefed
17 it originally in our original motion that was filed back in
18 late March. March 28th, I believe.

19 But in light of the Court's communication, we did further
20 research. We have found no cases that suggest that the
21 inquiry for colorability is greater than the plausibility
22 standard under *Twombly*. In fact, we found cases that suggest
23 just the opposite. The *Gonzalez* case which was cited is a
24 Northern District of Texas case. It was a gatekeeper case.
25 Not a bankruptcy case. But it was a gatekeeper case on an

1 ERISA claim that simply said that the plaintiff simply had to
2 be able to establish an arguable claim.

3 The *Deepwater Horizon* case, which is a Fifth Circuit case,
4 also states that the case -- the claim must only have some
5 possible validity.

6 So the threshold inquiry is very, very low. Evidence is
7 not allowed.

8 The *Gonzalez* case also suggested that the Court, similar
9 to a 12(b)(6) inquiry, is limited to the four corners of the
10 principal pleading -- in this case, the complaint, or now the
11 revised complaint.

12 So we don't believe that --

13 THE COURT: So, Mr. McEntire, --

14 MR. MCENTIRE: Yes, Your Honor.

15 THE COURT: -- let me -- help me with this. I'm
16 walking through -- because obviously the question we're
17 drilling down on is what is the appropriate legal standard for
18 the Court to apply --

19 MR. MCENTIRE: Yes.

20 THE COURT: -- in performing the gatekeeping
21 function. So I started the same place I guess you and
22 everyone else started, and that is with the plan, the
23 gatekeeping provision in the plan. And it starts on the
24 bottom of Page 50 and goes over to 51.

25 And you probably discovered, the same as I discovered,

1 that it doesn't give the appropriate legal standard. It just
2 says that the Bankruptcy Court -- that no enjoined party may
3 commence or pursue a claim or cause of action of any kind
4 against any protected party without the Bankruptcy Court --
5 turn over to Page 51 -- first determining, after notice and a
6 hearing, that such claim or cause of action represents a
7 colorable claim of any kind. And then the last sentence of
8 that paragraph: "The Bankruptcy Court will have sole and
9 exclusive jurisdiction to determine whether a claim or cause
10 of action is colorable."

11 Okay? So all that really tells us is that there has to be
12 notice and a hearing. That doesn't say what kind of hearing,
13 evidentiary or otherwise, and doesn't elaborate on colorable.

14 So, beyond that, here was my legal thinking. And maybe
15 this is all fully explored in your brief. I just don't know.
16 I thought, well, what legal standard do Bankruptcy Courts
17 apply in the *Barton Doctrine* context when someone is seeking
18 leave to sue a bankruptcy trustee? And then I thought, what
19 legal standard do Bankruptcy Courts apply in a *Louisiana World*
20 *Exposition*-type context if an unsecured creditors' committee
21 or other party brings a *Louisiana World Exposition* motion,
22 saying, we'd like leave to sue a party because the debtor-in-
23 possession is conflicted or whatever reason.

24 And so before we get to *Deepwater Horizon* and the other
25 cases, did you find any legal authority in the *Barton Doctrine*

1 context that you think sheds light? Because that seems to me
2 the most analogous context, right?

3 MR. MCENTIRE: Specifically to answer -- to respond
4 to your question directly, the answer is no. What we did find
5 specifically, though, was the case, as I'd indicated, the
6 Fifth Circuit directs that a 12(b)(6) standard be applied to
7 the issue of colorability. And that's the *Trippodo* case.

8 THE COURT: The what case?

9 MR. MCENTIRE: And that's also cited -- the *Trippodo*.
10 T-R-I-P-P-E-D-O [sic]. That is a Southern District of Texas
11 case that cites a Fifth Circuit precedent that directs that a
12 12(b)(6) standard be used as a template, if you will, for
13 determining colorability. And we've also cited that in our
14 brief.

15 THE COURT: And that, was that the one that was in an
16 ERISA context?

17 MR. MCENTIRE: No, ma'am. That was *Gonzalez*. And
18 that's cited on Page 7 of our brief.

19 THE COURT: And so --

20 MR. MCENTIRE: That was a gatekeeper -- a gatekeeper
21 issue. Before you -- you have to satisfy certain criteria
22 before the Court will allow the ERISA to even be filed, the
23 ERISA claim to even be filed. And so it was akin to a
24 gatekeeper function. And they applied specifically a
25 colorability or 12(b)(6) standard.

1 THE COURT: I'm sorry. What was the context? What
2 was -- who was seeking to sue whom over what in the *Trippodo*
3 case?

4 MR. MCENTIRE: The -- it was an ERISA claim. It was
5 in the -- I believe it's the Northern --

6 THE COURT: Oh, I thought you said is not an ERISA
7 claim.

8 MR. MCENTIRE: Well, no, I apologize. I may have
9 sorted my words. It was an ERISA claim. It was in the
10 Northern District of Texas, I believe. I have it right here.
11 One second. Yes, it's Northern District of Texas. It's a
12 2002 case. It was dealing with the amendment of pleadings to
13 bring forth an ERISA claim. And the issue there is whether or
14 not there's a colorable claim or whether it was frivolous or
15 futile. And the court determined that a -- that before you
16 even get to the 12(b)(6) level -- this case can actually stand
17 for the proposition that it's -- that it's even less than a
18 12(b)(6) standard. But before you even get there, you have to
19 address it from a futility or frivolity or is there any
20 evidence. The actual words that are used are, one second,
21 "any arguable claim."

22 THE COURT: Okay.

23 MR. MCENTIRE: Not plausibility. Not on the merits.
24 But any arguable claim. It's the lowest of possible
25 thresholds.

1 THE COURT: All right. Well, --

2 MR. MCENTIRE: And that's --

3 THE COURT: -- so, but just to be clear, you didn't
4 find anything in the *Barton Doctrine* context out there?

5 MR. MCENTIRE: I did not.

6 THE COURT: And what about --

7 MR. MCENTIRE: Now, to be honest --

8 THE COURT: Say again?

9 MR. MCENTIRE: To be clear, I did not -- I did not --
10 I apologize. We did not specifically look at *Barton*. I'll be
11 glad to do that and supplement as necessary.

12 THE COURT: Okay. And *Louisiana World*, you didn't
13 find anything that would shed light in that line of cases?

14 MR. MCENTIRE: I think we did. I believe *Louisiana*
15 *World* supports our position here.

16 THE COURT: It says what legal standard applies?

17 MR. MCENTIRE: One second. One second, Your Honor,
18 please.

19 (Counsel confer.)

20 MR. MCENTIRE: One moment, please, Your Honor.

21 (Counsel confer.)

22 MR. MCENTIRE: Can I -- I might have to supplement
23 that. I have someone looking for it right this second.

24 (Counsel confer.)

25 MR. MCENTIRE: It was a conflict issue.

1 (Counsel confer.)

2 MR. MCENTIRE: The *Louisiana World* case, it was a
3 little bit off topic. It had to do with a conflict of
4 interest where the creditors' committee had a conflict on
5 (inaudible) and the Court determined that the case should go
6 forward. And --

7 THE COURT: I know it was a different context. I'm
8 just trying to find something analogous to this gatekeeper
9 motion. And the most analogous things I could think of was
10 motions for leave that have been filed in a Bankruptcy Court
11 pursuant to the *Barton Doctrine*, wanting to sue a bankruptcy
12 trustee, where the Bankruptcy Court acts as a gatekeeper, and
13 then a *Louisiana World*-type situation where a creditors'
14 committee files a motion seeking leave to sue somebody,
15 arguing the debtor is not doing it, for either conflicts or
16 some other reason.

17 All right. So, assuming your case authority is the
18 guiding authority here and it's a Rule 12(b)(6)-type context,
19 you're saying I should look at the four corners of the
20 documents, or anything else the Fifth Circuit has said I can
21 look at, take judicial notice of, in a 12(b)(6) context and
22 not hear evidence?

23 But part of the reason we're having this dispute, right,
24 is because you've put forward some evidence? Do I understand
25 that correctly? And I have not dove into weeds on this yet,

1 but I understand there were affidavits submitted by you.

2 Correct?

3 MR. MCENTIRE: In order to make this determination,
4 you do not need to consider the Dondero affidavits that Mr.
5 Morris has raised. You do not need to consider any of the
6 documents that are actually associated with our motion.

7 We recognize that the application under the 12(b)(6)
8 standard, you'd be relegated to the four corners of the actual
9 complaint itself -- in this case, the revised complaint.

10 The 12(b)(6) standard is a guide. We take that to mean
11 that it's a low standard. It's, at most, a plausibility
12 standard, but we believe actually less.

13 We've provided the Dondero declaration -- declarations,
14 plural; there were two -- together with some documents to give
15 -- provide additional background for the Court. But Mr.
16 Morris has raised an objection. And under the circumstances,
17 assuming the Court follows the guideline of the *Trippodo* case,
18 then we would understand the Court would not consider the
19 actual Dondero declarations.

20 THE COURT: Does that mean you're withdrawing the
21 affidavits?

22 MR. MORRIS: I object to that, Your Honor. I really
23 -- I'll let counsel finish. This is just not right.

24 THE COURT: Okay.

25 MR. MCENTIRE: Well, I'm not sure what --

1 THE COURT: Your response to that?

2 MR. MCENTIRE: I think what we're doing is the
3 correct legal statement and articulation of what the law is.
4 Whether Mr. Morris likes it or not, I suppose, you know, with
5 all due deference to Mr. Morris, it's not a question of
6 whether I'm doing something that he likes. It's what I think
7 is legally correct. And I think that I've presented that as
8 best as I can to the Court.

9 THE COURT: Okay. Well, you never --

10 MR. MCENTIRE: By the way, --

11 THE COURT: Assuming I would allow withdrawal of the
12 affidavits, is that what you're seeking to do?

13 MR. MCENTIRE: Yes. If the Court is suggesting that
14 if I leave the affidavits attached to the motion that the
15 Court is going to allow this to become, effectively, a trial
16 on the merits -- when it shouldn't be, because that's not what
17 this is about, this is not a test of witness credibility, this
18 is not a test of the ultimate merits of the claim -- if that
19 is the situation that I'm being placed, then the answer is we
20 would not want to withdraw them but we will.

21 THE COURT: Okay. Well, you don't want to but you
22 will? I mean, I --

23 MR. MCENTIRE: Yes, correct. We do.

24 THE COURT: I feel like that means I need to explore
25 this a little, because I don't want -- well, any time

1 affidavits are put forward in this Court, or I think any other
2 court I know of, parties are always given the chance to cross-
3 examine an affiant or a declarant. Okay? We always allow
4 that if there's an objection to the underlying motion. So, --

5 MR. MCENTIRE: Well, here, --

6 THE COURT: -- I just want to make sure you're clear,
7 you put it in and then the other side said, well, we want a
8 chance to cross-examine the affiant. I allow that --

9 MR. MCENTIRE: Then --

10 THE COURT: -- always, a hundred percent, as does
11 every other judge I know. If there's an affidavit, if someone
12 wants to cross-examine them, obviously, there might be two
13 sides of the story. So I just want to be clear on what your
14 desired outcome is --

15 MR. MCENTIRE: Fair enough. I understand.

16 THE COURT: -- and request is.

17 MR. MCENTIRE: I understand the Court's statement.

18 We withdraw the Dondero affidavits for purposes of this
19 exercise and your consideration.

20 THE COURT: Okay.

21 MR. MORRIS: Can I be heard, Your Honor?

22 THE COURT: Yes. I'm going to let you be heard on
23 that. But any other argument you want to make, Mr. McEntire?

24 MR. MCENTIRE: Yes. One last thing. We did find the
25 reference to *Louisiana World*, and it was determined that no

1 evidence was appropriate and that the court should limit its
2 inquiry based upon the allegations in the pleading, and in
3 that case, to determine whether it was a colorable claim,
4 which would, if pursued successfully, could have increased the
5 value of the estate. So, the *Louisiana World* case does
6 suggest that there's not an evidentiary component to this
7 inquiry.

8 THE COURT: Okay. Let me be clear. You first said
9 it held no evidence was appropriate, and then you said
10 suggest. So, did the court actually tackle what is the legal
11 standard and is evidence appropriate? Did it actually tackle
12 those specific issues? That's all I really care about.
13 Because I've read the case.

14 MR. MCENTIRE: Yes. The citation in our brief is
15 that the Court need not be satisfied that there's an
16 evidentiary basis on the merits of the claim to be asserted.
17 And we have cited the *Louisiana World* case at Pages 252 and
18 253. Allegations were sufficient and no evidentiary hearing
19 was necessary to determine -- in this case it was a breach of
20 fiduciary duty claim -- whether it had -- whether it was
21 appropriately colorable to move forward.

22 THE COURT: Okay. Courtney, you can be drilling down
23 on that.

24 All right. Anything else?

25 MR. MCENTIRE: On the evidence issue, no, Your Honor.

1 We would, again, if the Court has time, we would encourage the
2 Court to read our brief. We believe we've laid out the law
3 fairly succinctly and clearly, and we stand by our brief --

4 THE COURT: All right.

5 MR. MCENTIRE: -- and our objection.

6 THE COURT: Well, of course I have time and I will
7 read it, but I just, given when it was filed and that I wasn't
8 alerted to it being there, I'm just explaining why I have not
9 read it yet.

10 All right. Mr. Morris, your argument?

11 MR. MORRIS: Good afternoon, Your Honor. John Morris
12 for the Claimant Trust and for the Reorganized Debtor.

13 Your Honor, we understood this to be a status conference.
14 We didn't understand this to be a day for rulings by the
15 Court. We didn't understand there was an issue for the Court
16 to determine today. Hunter Mountain has now filed two briefs
17 on the topic of the standard of colorability, and they've made
18 an exhaustive argument, doing all of this before we -- before
19 any of the objecting parties have had an opportunity to be
20 heard.

21 Our brief is due on May 4th, and we respectfully request
22 that the Court, subject to other comments that I have this
23 afternoon, withhold judgment on anything that's happened here
24 today.

25 Mr. McEntire has completely misstated the law. He has no

1 understanding, apparently, of what a gatekeeper is and how it
2 functions under *Barton*. And there's been no reference at all
3 to the purpose of the gatekeeper, which is set forth
4 explicitly, clearly, and in great detail in the Court's
5 confirmation order. Okay?

6 12(b)(6), I don't want to -- I don't want to get too far
7 ahead of myself, but 12(b)(6) has nothing to do with this
8 case. Of course this has turned into a bit of a circus, Your
9 Honor, as it always does in Highland. This was a very simple
10 matter. Hunter Mountain filed a motion for leave to file a
11 complaint under the gatekeeper provision of Highland's plan.
12 They attached a copy of their proposed complaint. And
13 Paragraph 1 of their motion says, The motion is separately
14 supported by the declarations of James Dondero dated May 22nd
15 -- May 2022 and February 2023.

16 And these aren't just two declarations, Your Honor.
17 There's almost 400 pages of attachments to these declarations.
18 And now, 10 days before our opposition is due, because Mr.
19 Dondero fears being cross-examined, Hunter Mountain just
20 willy-nilly thinks they can withdraw those affidavit and
21 declarations? That is greatly prejudicial, and I just can't
22 believe what I just heard.

23 They don't want to do it, they don't want to subject their
24 client to some cross-examination, when they put their
25 declarations into evidence, when they said that their motion

1 was based on these declarations.

2 We should have that opportunity, Your Honor. Forget about
3 the standard. As Your Honor rightly pointed, the rule is very
4 clear. You offer declarations; we get to cross-examine.

5 On Friday night, we got Hunter Mountain's objection.
6 Their, really, their second attempt to deal with colorability.
7 Last night, they filed what they characterize as support or a
8 supplemental document, which Hunter Mountain insists is not an
9 amendment of their pleading.

10 Your Honor, I've had Hunter Mountain provide the Court
11 with a blackline. I would respectfully request that the Court
12 instruct Hunter Mountain to file it on the docket so that it
13 becomes part of the official record in this case. If Your
14 Honor reviews the blackline version, which is not on the
15 docket but was emailed earlier today at my request, the Court
16 will see just how extensive the changes are to this pleading.
17 So here they are, without leave of Court, without filing a
18 motion to amend, without anything, they simply dump a brand
19 new complaint on us 10 days before our opposition is due, and
20 today tell us they're not going to include the Dondero
21 declarations.

22 This is all terribly wrong, Your Honor. This is not the
23 way the process is supposed to work. I've seen a lot in this
24 case, but this is a new standard for chaos.

25 The changes are extensive. And I just want to point out a

1 couple of them. They now claim that Mr. Seery exercised
2 "despotic control" over the Debtor. I believe I have the
3 right to inquire as to the factual basis for that ridiculous
4 allegation.

5 They allege in Paragraph 2 of the newly-amended complaint
6 that Seery "failed to cause the Debtor to make financial
7 disclosures, as required."

8 Your Honor has been in this case since December of 2019.
9 As this Court is aware, the single only financial disclosure
10 that was not filed with the Court was pursuant to Rule 2015.3.
11 Mr. Dondero commissioned his investigation. As his
12 declarations say, he caused Mr. Rukavina and Mr. Draper to
13 complain to the U.S. Trustee's Office. Nothing.

14 They objected to confirmation. They made a motion. They
15 went to the District Court. They went to the Fifth Circuit.
16 That one single document is not a basis to say that Mr. Seery
17 failed to cause the Debtor to make financial disclosures.

18 We have the right, Your Honor, under the -- under the
19 gatekeeper, under this Court's confirmed plan -- which, by the
20 way, is worth nothing that in their newly-amended proposed
21 complaint they specifically say they do not challenge the
22 confirmation order. And I would encourage the Court to look
23 at Paragraphs 77 through 80. They don't challenge that order.
24 And that order tells us that we have the ability to inquire as
25 to the good faith nature of these allegations. It has nothing

1 to do with 12(b)(6).

2 Because these changes are so extensive, Your Honor, we
3 think we need a further change to the schedule. We believe
4 the law says that this is an amendment that requires a
5 resetting of the clock. But we don't need that much time,
6 Your Honor. We need just a brief adjustment to the schedule.
7 And we specifically propose that the objection deadline be
8 extended by one week, from May 4th to May 11th. The reply
9 deadline should be extended by one week, from May 11th to May
10 18th. And the hearing date should be extended by one week,
11 from May 18th to May 25th, or any day the following week after
12 Memorial Day.

13 The objecting parties should not be prejudiced by Hunter
14 Mountain's continued evolution of their claims. This is --
15 and this approach is completely fair and reasonable.

16 And we want to touch just for a moment on this concept of
17 derivative standing. Again, Your Honor, we plan on addressing
18 this in detail in our submission. We shouldn't be required to
19 set forth all of our arguments before they're fully
20 formulated, pursuant to the Court's scheduling order. But I
21 do want to make a couple of points.

22 Another attorney representing Hunter Mountain filed what
23 it called the valuation motion. The first iteration, Your
24 Honor will recall, was actually filed by Doug Draper on behalf
25 of Dugaboy last summer. Then Louis Phillips represented

1 Hunter Mountain. When that motion was denied, the Stinson
2 firm came in and represented Hunter Mountain. They filed a
3 new valuation motion.

4 Here's the irony, Your Honor. Mr. Dondero and Hunter
5 Mountain and Dugaboy keep telling the Court assets exceed
6 liabilities. Assets exceed liabilities. And you know our
7 position on that, Your Honor. They may; they may not. It's
8 also irrelevant at the end of the day because of the
9 indemnification claims. And we'll talk about that more in a
10 moment.

11 But the important thing is that, if assets exceed
12 liabilities, how could anybody other than, according to Hunter
13 Mountain, Hunter Mountain have been harmed by anything?
14 Creditors, according to Mr. Dondero, are getting paid in full.
15 How could any of these allegations have harmed any beneficial
16 holder of an interest in the Claimant Trust today? According
17 to Mr. Dondero, they're going to get paid a hundred cents on
18 the dollar. Where's the damages?

19 There's no derivative claim here. This is a -- this is an
20 action by and for Hunter Mountain and nobody else. And it's
21 frivolous. And we will prove that.

22 Make no mistake. The Trust and the Reorganized Debtor has
23 a substantial outcome in this motion, and that's why I'm here.
24 I'm here because the Trust has substantial indemnification
25 obligations. Mr. Dondero seems to forget that. But those

1 indemnification obligations are real, and the Trust and the
2 Reorganized Debtor have an affirmative duty on behalf of the
3 Claimant Trust beneficiaries to make sure that baseless
4 litigation is nipped in the bud. And that's why I'm here.

5 There is no rule of law that says you let the fox into the
6 henhouse simply because the fox fabricates a story that the
7 henhouse is on fire. The henhouse is not on fire, and an
8 evidentiary hearing will prove that.

9 As for the subject at hand, it's important to remember
10 that the underlying motion is not a defendant's motion to
11 dismiss, but rather it's Hunter Mountain's motion for leave to
12 file a complaint under the gatekeeper. The burden has
13 shifted. They have the burden, not the putative defendants,
14 but Hunter Mountain.

15 The gatekeeper provision was contained in Highland's plan,
16 it was confirmed by this Court, and it was confirmed -- it was
17 affirmed by the Fifth Circuit Court of Appeals.

18 We appreciate the Court's preliminary view that an
19 evidentiary hearing is appropriate here, and we understand why
20 there's two reasons for that: Because they put declarations
21 into the record; and more importantly, because the gatekeeper
22 provision requires it.

23 Hunter Mountain's objection to an evidentiary hearing is
24 disingenuous. Mr. Patrick, Mr. Dondero, Hunter Mountain, they
25 all know the gatekeeper analysis is not a 12(b)(6) analysis,

1 for at least the following reasons. Mr. Dondero and his
2 affiliates have been fighting the gatekeeper provision since
3 the moment it was proposed. They fought it at confirmation,
4 they appealed it to the Fifth Circuit, they objected when this
5 Court entered an order approving the gatekeeper without
6 modification, in conformity with the Fifth Circuit's decision,
7 and then going back to the Fifth Circuit to challenge the
8 gatekeeper.

9 Why would you do all of that? Why would you spend that
10 money? Why would you exhaust every potential avenue? If you
11 thought it meant nothing, if you thought it was a less
12 standard than 12(b)(6), who would do that? I think their
13 conduct proves that they know the standard is substantially
14 higher. And if they only read the Court's confirmation order,
15 they would know that for certain.

16 Hunter Mountain's own pleadings prove that they know this
17 is not a 12(b)(6) standard. If they thought it was a 12(b)(6)
18 standard, they wouldn't have specifically and expressly asked
19 the Court to look beyond the four corners of the complaint.
20 Right? That's what they did in Paragraph 1 of their motion,
21 the very first document filed here, **Docket No. 3699**, Paragraph
22 1: The motion is supported by the declarations of Jim
23 Dondero.

24 Why would you do that if you thought all the Court had to
25 do was look at the four corners? They'll never be able to

1 rationally explain that. They're attempting to, and I hope
2 the Court won't let them, they're attempting to withdraw the
3 declarations today because they found out afterwards that when
4 you put declarations into the record people are allowed to
5 cross-examine.

6 The Court should not allow Hunter Mountain to play these
7 games.

8 There's more. They know they don't have the goods here.
9 How do you know they don't have the goods here? Because the
10 facts are based on Mr. Dondero and Mr. Dondero alone. This
11 email that he sent to Mr. Seery in December 2017, as well as
12 this phone call or phone calls that he allegedly had with one
13 or two representatives of Farallon. This is all Mr. Dondero.
14 He had all of this information in the spring of 2021. Did he
15 bring anything to this Court's attention? No. You know what
16 he did? He sought discovery. And he filed a 202 petition in
17 Texas state court.

18 If you have the goods, if you have the evidence, bring
19 your claim. He didn't do that because he knew he didn't have
20 the evidence. He knew he didn't have the goods. So they went
21 fishing. They went fishing to state -- Texas state court, and
22 they came up with nothing. Right? It was removed to this
23 Court.

24 Your Honor will recall that in early 2022 Your Honor had a
25 hearing and remanded it back to state court. Mr. Dondero

1 filed another declaration with another version of his phone
2 call with Farallon. And Texas state court dismissed the
3 petition.

4 Hunter Mountain waits seven months. I don't know why they
5 wait seven months, but they wait seven months. They have the
6 same evidence. They don't file a complaint. Instead, Hunter
7 Mountain files another 202 petition, searching for evidence.
8 They went fishing again, and again went home empty, with Mr.
9 Dondero's third recitation of his conversation with Farallon,
10 but a second and different Texas state court said, no dice, no
11 discovery.

12 That's why they're here now, because they swung and they
13 missed twice. They have no better evidence today than they
14 did in the spring of 2001 [sic] when a decision was made that
15 they didn't have enough to bring an action. They know
16 12(b)(6) is not the standard here, Your Honor.

17 Mr. Stancil is here today on behalf of Mr. Seery. I
18 understand Mr. Stancil wants to introduce himself to the Court
19 and provide some very preliminary views on the gatekeeper
20 standard and related matters. Highland -- Holland & Knight is
21 here on behalf of the Claim Purchasers, and I'm sure they'll
22 want to weigh in.

23 In the end, Your Honor, this was supposed to be a status
24 conference. There's nothing for the Court to decide. A
25 scheduling order was in place, and we'd respectfully request

1 that it be adjusted in light of, you know, these amended
2 pleadings. I don't know why they -- you know, their amended
3 pleadings. Just look at the blackline.

4 We should have the allotted time to respond to these
5 issues, and we will do so. And I'm very confident that at the
6 completion of briefing the Court will find it not only
7 appropriate but necessary to hear evidence on this motion.

8 That's all I have, Your Honor.

9 THE COURT: All right. Let me be clear. The
10 redline, should I have it somehow? It was not filed on the
11 docket. You're wanting --

12 MR. MORRIS: It was not, Your Honor, --

13 THE COURT: Okay.

14 MR. MORRIS: -- just to be clear. I think -- I
15 brought to Mr. McEntire's attention this morning that the
16 Court's prior instruction in this case was that when you were
17 going to file amended documents, when you were going to use
18 amended documents, that blacklines should be filed with the
19 Court. And a blackline was sent I believe to Ms. Ellison and
20 to all counsel of record, but it wasn't filed on the docket.
21 And I respectfully request that it be put on the docket,
22 because I think that needs to be part of the record of this
23 case.

24 THE COURT: Okay. I just -- I got from Traci the
25 redline.

1 MR. MORRIS: Yeah. Just open it up. You'll see.

2 THE COURT: It was not sent to her until 12:00 noon,
3 and then she sent it to me at 1:00-something. So I've got it
4 now. All right. There it is. It's 43 pages.

5 MR. MCENTIRE: Your Honor? May I respond very
6 quickly to the --

7 MR. MORRIS: No. Your Honor? Your Honor?

8 THE COURT: I'll let you have rebuttal argument at
9 the end, --

10 MR. MCENTIRE: Fair enough.

11 THE COURT: -- after I've heard from all of the other
12 parties in interest.

13 So, who wants to go next? Mr. McIlwain or counsel for Mr.
14 Seery, Mr. Stancil? Who wants to go next?

15 MR. STANCIL: Your Honor, I think it's -- well, this
16 is Mark Stancil for Mr. Seery. I think it's my turn.

17 THE COURT: Okay.

18 MR. STANCIL: And I'll try to be brief, Your Honor.
19 I think it'd be helpful mostly to explain just in a little bit
20 of detail why we agree completely with Mr. Morris's statement
21 that Your Honor should await full briefing on this issue.
22 Just in response to certain of the comments made earlier by
23 the Plaintiffs, I'd like to just sort of maybe level-set a
24 little bit.

25 For starters, I was confused that Mr. McEntire said he did

1 not look for cases under *Barton*, because Your Honor
2 specifically cited *Barton* in the confirmation order in
3 approving the gatekeeper provision, which I believe it's in
4 Paragraph 80 in the confirmation order on Page 58. That's
5 **Docket No. 1943**. And Your Honor specifically cites the
6 Supreme Court's *Barton Doctrine*.

7 Moreover, that followed recitation of the extensive
8 factual findings that supported the requirement of a rigorous
9 gatekeeping requirement, including Paragraph 77, which the
10 Court found as fact that Mr. Dondero and the Dondero-related
11 entities have harassed the Debtor, which has resulted in
12 further substantial, costly, and time-consuming litigation for
13 the Debtor.

14 And as particularly relevant here, the Court further found
15 that this harassment had been specifically directed at Mr.
16 Seery, among others.

17 The Court further found in Paragraph 78 that Mr. Dondero's
18 abuse of litigation "was consistent with his comments as set
19 forth in Mr. Seery's credible testimony that if Mr. Dondero's
20 plan proposal was not accepted he would 'burn down the
21 place.'"

22 So, accordingly, Your Honor, the reference to *Barton* is
23 very much a robust gatekeeping entity -- requirement. And
24 we're exactly today where the Court had predicted in entering
25 this order, that the costs and distraction of this litigation

1 are substantial. And if all we're doing is replicating a
2 12(b)(6) hearing on a motion for leave, we're actually not
3 doing anything to reduce, as the Court made clear, the
4 burdens, distractions, of litigation.

5 The Fifth Circuit likewise cited *Barton* in its order
6 affirming the confirmation order. Specifically, it also
7 explained that the provisions, these gatekeeper provisions
8 requiring advance approval were meant to "screen and prevent
9 bad-faith litigation." Well, that -- if that means only what
10 the Plaintiffs say it does, then it really doesn't do anything
11 at all to screen. There's no gatekeeping because their
12 version of what that means is always policed under 12(b)(6)
13 standards.

14 Moreover, the essence of bad faith is saying things in a
15 complaint that are not true and are easily proved to be false.
16 You know, the irony of their position is if you lard a
17 complaint up with absolute falsehoods and lies, well, those
18 have to be taken as true, and so, you know, they'll survive
19 the motion to dismiss, and so therefore we can file it. That
20 would turn the bad faith essence of the gatekeeping provisions
21 here on their head.

22 So we think this is all about *Barton* and its progeny. But
23 I would also provide Your Honor with maybe a 30-second preview
24 of why we think *Barton* does have clear support for evidentiary
25 hearings.

1 We -- I will refer Your Honor to a recent decision of the
2 Fifth Circuit in a case *In re Foster*, 2023 WL 20872. And that
3 was from January of this year, in which the Fifth Circuit
4 affirmed a determination that a post-effective-date litigation
5 could not be brought against the trustee. It's got a little
6 bit of a complicated history, but I would -- I'll summarize to
7 say the suit was filed in the state court, removed to federal
8 court, and then there was a bankruptcy hearing, evidentiary
9 hearing, and ultimately the Bankruptcy Court's decision was
10 affirmed.

11 And we know there's an evidentiary hearing because if we
12 look at the District Court's appeal opinion in that case, 2022
13 WL 160240 at *3, it specifically notes an evidentiary hearing
14 because they had put a factual question before the Court.

15 But as a further preview to a brief that you'll be
16 receiving from us, I think our count is up to nine circuits
17 that apply an abuse of discretion standard to reviews of
18 determinations under *Barton*. And of course, an abuse of
19 discretion standard on appeal makes no sense if one is
20 applying a mere 12(b)(6) standard, which, of course, is *de*
21 *novo*.

22 One brief word on *Louisiana World*, Your Honor, because I
23 believe the analogy they were drawing there is akin to a
24 creditors' committee standing analysis. We're not at all
25 agreeing that that level of analysis is appropriate here, but

1 I would add just a couple of things about that case.

2 First of all, that's a pre-effective-date question of a
3 committee's standing to bring a cause of action. This, we're
4 talking about repeated findings of abuse of process, giving
5 rise to a gatekeeper action that applies beyond the effective
6 date.

7 But that aside for the moment, even in the creditors'
8 committee context, those creditors also have to show that the
9 underlying action is both colorable and also that the party
10 that didn't bring it was unjustified. So the Court looks
11 beyond the mere 12(b)(6) standard in that context.

12 And I would just flatly disagree with Mr. McEntire's
13 characterization of that decision as saying that evidence is
14 not required. If Your Honor looks at Footnote 15 in that
15 decision, which is at Page 248, so we're at 858 F.2d 233 at
16 248, the court explained why "an evidentiary hearing was
17 unnecessary under the circumstances." And the circumstances
18 the court goes on to note are that the officers and directors
19 "did not object at any time to the committee's application"
20 and further found that the committee had demonstrated the
21 existence of a potential cause of action, and the officers and
22 directors neither refuted any of the committee's claims nor
23 objected to them. "Under the circumstances, we are at a loss
24 to understand just what could have been gained from an
25 evidentiary hearing on an application which drew no

1 objections."

2 So, respectfully, Your Honor, I don't think that case
3 could possibly stand for a blanket rule that evidence is not
4 appropriate in support of this, this -- even that analysis.

5 I think, Your Honor, the most important thing I'd like to
6 ask for is the opportunity, as Mr. Morris mentioned, to write
7 all this down for you instead of reading case snippets for
8 you. We're in the middle of writing our brief. And it has
9 changed quite a bit. We think the brief will be very helpful.

10 I would add, moreover, that there's no harm to be had by
11 having an evidentiary hearing. If after full briefing Your
12 Honor were to decide, you know what, this is a 12(b)(6)
13 standard -- we don't think you will; we think it's actually a
14 slam dunk to the contrary -- but the Court can, like in many
15 bench trials, decline to rely on evidence and just say, hey,
16 I'm not going to look at that, and here's -- here's where we
17 go. But at least then the hearing will be -- we'll have it,
18 and we'll have the record.

19 More importantly, we actually think there's enormous value
20 in getting this right, as the Court of Appeals has told us
21 getting it right under *Barton* and applying the correct
22 scrutiny is required.

23 So, unless the Court has questions, I can turn it back to
24 Mr. Morris or to Mr. McIlwain.

25 THE COURT: All right. I don't think I have

1 questions at the moment of you, but I'll turn to Mr. McIlwain
2 and see if I have any questions for the collective group at
3 that point. And of course, I'll go back to Mr. McEntire as
4 well.

5 All right. Mr. McIlwain, go ahead.

6 MR. MCILWAIN: Thank you, Your Honor. Brent McIlwain
7 here, again, from Holland & Knight for the Claim Purchasers.
8 Your Honor, I'll be brief and just echo what Mr. Stancil and
9 Mr. Morris said.

10 I guess, from a practical standpoint, though, what I'm
11 most concerned about here is the procedure by which we've
12 gotten to where we've gotten. It started with a motion for
13 leave to file this complaint on what was supposed to be three
14 days' notice. The Court denied that, rightly. That was
15 appealed, and then there was a *mandamus* to the Fifth Circuit,
16 all -- all of which were denied.

17 Here we are on the eve of this status conference,
18 objections are filed, new pleadings are filed. I think what's
19 being demonstrated is precisely why this Court has a
20 gatekeeper order in place. Mr. Dondero and his counsel are
21 vexatious litigators, and they're looking for any opportunity
22 to get a leg up on us. On anybody in their path, frankly.
23 And the Court should give us a reasonable opportunity to brief
24 this, should give us a reasonable opportunity to present our
25 case, and we should know what we're fighting against. Are we

1 fighting against a motion for leave that's supported by
2 affidavit or not? And if we're not, they need to file a new
3 motion or strike the affidavits on the record.

4 We can't have this ever-evolving pushing against a rope to
5 determine what exactly we're fighting against. And the Court,
6 the Court and the parties who are the subject, frankly, of
7 what are fantastical make-believe theories from Mr. Dondero
8 are entitled to know what the story is. And we're entitled to
9 know what the pleading is. And if the pleading is -- as soon
10 as the pleading is set, then we can respond.

11 So we're here to ask the Court, if we want to set a
12 hearing, let's close the pleadings as it relates to Hunter
13 Mountain. They shouldn't be even filing any further. Because
14 if they're going to file something further, we need more time.
15 And I'm okay with the schedule that Mr. Morris has outlined,
16 but, frankly, it's generous to Hunter Mountain.

17 Anyway, Your Honor, I don't have anything substantively to
18 add, but we will include a comprehensive response in our
19 responsive brief whenever that filing, whenever we can
20 determine exactly what we're responding to.

21 Thank you, ma'am.

22 THE COURT: All right. Mr. McEntire, you're the
23 Movant, you have the last word.

24 MR. MCENTIRE: Yes, ma'am. Thank you. I'll try to
25 be brief here.

1 Mr. Morris says -- I wrote down his words -- if you have
2 the evidence, bring the claim. The revised --

3 THE COURT: I'm sorry, I did not -- I didn't hear
4 what you said. Could you repeat what you just said?

5 MR. MCENTIRE: Yes, ma'am. Mr. Morris just told the
6 Court that if they have the evidence, bring the claim. We
7 have the evidence. And all you need to do is to look at the
8 four corners of the revised claim that is before you. And you
9 do not need to look at the Dondero declarations.

10 THE COURT: Let me --

11 MR. MCENTIRE: And we withdraw the Dondero --

12 THE COURT: Let me -- can I stop you right there? I
13 mean, --

14 MR. MCENTIRE: Yes.

15 THE COURT: -- the point was made by I forget which
16 lawyer now that your original motion for leave attached
17 something like 387 pages of not just Dondero affidavits, but
18 other evidentiary support. So I'd just like you to respond to
19 that.

20 MR. MCENTIRE: Sure.

21 THE COURT: Why did you initially out of the gate
22 think the Court needed to consider 387 pages of attachments?
23 And --

24 MR. MCENTIRE: We never saw this, Your Honor, we
25 never saw this as an evidentiary inquiry.

1 THE COURT: But --

2 MR. MCENTIRE: That was simply background for the
3 Court. The allegations themselves can --

4 THE COURT: But stop. Why would you -- call it
5 background, evidence, whatever you want to call it -- why
6 would you submit all of that if you think I just need to look
7 at the four corners and apply a 12(b)(6) standard?

8 MR. MCENTIRE: I would suggest -- fair enough. I
9 would suggest that probably 80 to 90 percent if not more of
10 those documents are from the Court's docket. They are simply
11 docket references in the Court's docket. Very little is
12 outside the four corners of the proceedings that you've been
13 administering, Your Honor.

14 They're also referenced in the four corners of our
15 pleading. The allegations are set forth in the four corners
16 of our pleading. You don't need to go to the docket -- you
17 may, if you wish -- but you don't need to go to the docket to
18 look at those documents, because the allegations speak for
19 themselves.

20 And the revised complaint that is before you or that was
21 with our motion -- and by the way, responding to one of other
22 counsel's statements, I don't have to seek leave to amend a
23 complaint that has not been filed yet. What we're seeking to
24 do is we're seeking to bring forth to the Court a complaint
25 for your consideration as to whether we state a colorable

1 claim. And we don't need Mr. Dondero's declarations, and we
2 don't -- you don't need to go look at all those documents.
3 You can look at the four corners of our complaint and make
4 that decision.

5 And to -- so we -- Mr. Morris's invitation is we have the
6 evidence, bring the claim. That's exactly what we're doing.
7 Because if you review the claim, much of which is financial in
8 nature -- and by the way, the -- with all due deference to Mr.
9 Morris, I've heard the name Mr. Dondero probably 50 times
10 during this hearing. And we don't need Mr. Dondero to support
11 the four corners of this complaint. And if you look at the
12 complaint itself, there's no reference to Mr. Dondero -- or if
13 there is, it's very few -- in the complaint itself. And this
14 is -- Mr. Dondero is not bringing this particular motion.
15 This is a motion by Hunter Mountain. Mr. Dondero is not
16 directing the filing of this motion. This is a motion filed
17 on behalf of Dondero and -- excuse me, on behalf of Hunter
18 Mountain, and hopefully on behalf of the Reorganized Debtor
19 and the Claimant Trust.

20 And so when we hear Mr. Dondero, it's an attempt to
21 distract the Court. And what we need to do is just take a
22 step back, not have distractions, look at the complaint, and
23 under a 12(b)(6) standard, which is the appropriate standard
24 at most, I think the Court will find that we have stated far
25 more than a colorable claim.

1 I will also point out that Mr. Morris has not identified
2 one single case suggesting or supporting his position. Not
3 one single case. And counsel for Mr. Seery has really not
4 addressed the *Louisiana* case that we've identified in an
5 effective way.

6 THE COURT: He said -- he said --

7 MR. MCENTIRE: If he wants additional --

8 THE COURT: He said that was in a pre-confirmation
9 context, and he pointed out the recent *Foster* case. What is
10 your response to the recent *Foster* case?

11 MR. MCENTIRE: The issue here is colorability. And I
12 don't have the recent *Foster* case before me. The issue is
13 colorability. There's nothing in the Court's gatekeeping
14 protocols in the plan that changes the standard. The standard
15 is the same as the Fifth Circuit has articulated, and that is
16 to -- that it's not a fruitless claim, --

17 THE COURT: But the question is, --

18 MR. MCENTIRE: -- that there's some evidence.

19 THE COURT: The question is whether the hearing that
20 is required by the plan -- which said the Bankruptcy Court,
21 after notice and a hearing, will determine whether an action
22 should go forward -- whether the hearing contemplates
23 evidence. Does the Court need to hear evidence? And to me,
24 that partly turns on what my legal standard is.

25 In *Foster Mortgage*, --

1 MR. MCENTIRE: Yes.

2 THE COURT: -- the court heard evidence. And it was
3 a *Barton* motion, which, as I identified, I think is a pretty
4 darn analogous situation.

5 And I'll just let you know, my law clerk found a case from
6 the Third Circuit, *Barton Creek*, where they considered
7 evidence. *Vistacare Group*, 678 F.3d 218 (3rd Cir. 2012).

8 So, again, I am just here to figure out what kind of
9 hearing we set. And maybe --

10 MR. MCENTIRE: That --

11 THE COURT: Maybe it's just -- maybe it's premature.
12 Maybe I can't make that decision today because I have
13 apparently very different views on whether evidence is
14 appropriate and what my legal standard is. Maybe we need to
15 just hear the briefing --

16 MR. MCENTIRE: We will take a look at the *Foster*
17 case, Your Honor. And, as appropriate, I will -- we'll
18 provide counsel our views on that. He's raised the issue, and
19 we would like to be able to respond.

20 With regard to the schedule, I would suggest to the Court
21 that the schedule as it exists is appropriate and sufficient
22 because there's more than 24 or 25 days to respond to this
23 pleading. And -- number one. Number two, regardless of how
24 Mr. Morris liked to characterize the redline or the blackline
25 or whatever-line, the bottom line is the pleading has actually

1 been streamlined. We've actually dropped a claim. We dropped
2 one of the causes of action. And what has been included --

3 THE COURT: Which one was dropped?

4 MR. MCENTIRE: -- is the fraud that --

5 THE COURT: Which one was dropped?

6 MR. MCENTIRE: Fraud. We dropped fraud. We
7 reorganized the pleading with a very large introductory
8 section. And so what appears to be a lot of redline is a lot
9 of just procedural reorientation of the pleading.

10 And the other thing I would point out, we have asserted a
11 fraudulent concealment discovery rule allegation, and we have
12 enhanced our conflict allegations against Mr. Seery.

13 We have also taken advantage of the financial data that
14 just came out last week and incorporated some of that.

15 So a lot of this has occurred and a lot of our changes to
16 the pleading have occurred or additions have occurred since
17 the filing of the original motion. And so we don't believe
18 there's -- the substantive nature of our allegations have not
19 changed. We have added one or two additional declaratory
20 judgment actions, and that's it.

21 And so setting aside attempts to mischaracterize
22 expediently what may or may not be, I simply ask the Court to
23 look at what's before it and to try to kind of pierce through
24 the argument and perhaps a misdirection. Because, very
25 clearly, the case has actually been lessened and is more

1 streamlined than anything.

2 With that, Your Honor, I would simply go back and say
3 this. I don't believe we need to extend the briefing deadline
4 any further. Mr. Dondero is not necessary for this Court's
5 inquiry to determine what the appropriate standard is and
6 whether evidence is required. We believe we are correct. We
7 will brief the *Foster* case and take a look at it since counsel
8 has raised it.

9 And I would, again, underscore the fact that Mr. Morris
10 came in here today, talked for 30 minutes, and didn't offer
11 the Court one single case citation.

12 Thank you.

13 THE COURT: All right. Well, he did start out by
14 saying he didn't think we were going to discuss legal
15 authority today.

16 MR. STANCIL: Your Honor, I don't want to reopen the
17 wound, but if Your Honor wants cases, I've got -- I think I'm
18 -- I have nine I could cite at the moment for the standard of
19 review under *Barton*. It is not a 12(b)(6) standard. I assume
20 Your Honor will ask if she wants those today or just wants to
21 get those in our brief.

22 THE COURT: I want to --

23 MR. STANCIL: But I would hate for the record --

24 THE COURT: I want to get briefs. And in thinking
25 through what kind of mini-scheduling order we're going to

1 have, I'm going to think out loud a bit. I will just tell
2 you, I feel like this is -- deciding what is a colorable
3 claim, I just strongly am inclined to think it's a mixed
4 question of fact and law. Okay? And I am strongly inclined
5 to think the Court's best guidance is from the *Barton Doctrine*
6 cases.

7 And, again, I remember that *Foster* case from January.
8 It's been three months since I've read it and I can't remember
9 if they talked about legal standard or what kind of hearing
10 you have to any great extent. But I do know the Court in Fort
11 Worth heard evidence on that.

12 And, again, this Third Circuit case, *Vistacare* -- hang on.
13 The court, just in Footnote 12, the Third Circuit points out
14 evidence was presented and considered.

15 So I tend to think those are the most analogous cases, the
16 *Barton Doctrine* cases. So I am going to allow briefing on (a)
17 is it appropriate for the Court to hear evidence, and (b) any
18 authority you can find regarding what is the appropriate legal
19 standard. Colorable. I mean, those are actually closely
20 overlapping issues, right? I guess they're one and the same,
21 right? Because plausible, Rule 12(b)(6), you usually stick
22 within the four corners of the documents, although you can
23 take judicial notice of pleadings and the record in the case.
24 But it looks like most of these *Barton Doctrine* cases have
25 allowed evidence, suggesting it's at least a different

1 standard than 12(b)(6).

2 So I'm going to allow briefing on that, and we're going to
3 talk about dates. But I'm just, I'm trying to decide -- and
4 maybe I should get your comments on this, actually -- should
5 we have legal briefing on other issues besides just what does
6 the colorability standard entail.

7 Because here are a couple of things that just kind of make
8 me wonder, do we need an evidentiary hearing or not? Do we
9 have a legal question here about is all of this -- is this
10 complaint, the claims in the complaint, would these be
11 administrative expense claims that should have been asserted a
12 long time ago? Does anyone want to talk about that? I mean,
13 maybe I'm getting way ahead of myself. But the whole idea of
14 Hunter Mountain is bringing these derivatively on behalf of
15 the Reorganized Debtor. Well, maybe that negates my theory.
16 I don't know. But I just think is this something -- maybe I'm
17 all off. Maybe you all have thought about this a little more.

18 MR. MORRIS: Your Honor, yeah, if I may.

19 THE COURT: Okay.

20 MR. MORRIS: Number one, I hope whatever schedule the
21 Court decides upon, that we stick to the schedule and that we
22 don't have random briefs getting filed.

23 At this point, Your Honor, whether it's May 4th or May
24 11th, I think the objecting parties are going to address the
25 two issues that you've identified, whether or not this should

1 be an evidentiary hearing and the standard of colorability.
2 I'm also quite confident that other legal issues will be
3 addressed, including whether or not Hunter Mountain has a
4 legal right to even assert a derivative claim, whether or not
5 duties are owed that would support some of these causes of
6 action.

7 So there are other legal issues that we plan to address.
8 But I would respectfully request that, whether it's May 4th or
9 May 11th, you allow the objecting parties to file their
10 papers, and then whether it's May 11th or May 18th, Hunter
11 Mountain gets one and only one chance to respond in their
12 reply. That's what the scheduling order is intended to do.

13 And I heard Mr. McEntire refer to yet another so-called
14 supplement, and I don't want to chase a new brief every two
15 days. That's not the way the process --

16 THE COURT: Well, --

17 MR. MORRIS: -- is intended to work.

18 THE COURT: -- absolutely. We're going to have --

19 MR. MORRIS: And -- and --

20 THE COURT: -- a firm scheduling order. But what I
21 was thinking out loud about was would I hear or consider,
22 entertain briefing on any subject besides the legal standard
23 and do we have evidence. Because there are a couple legal
24 issues out there swirling around. I don't know if my
25 administrative expense argument/concern even makes sense,

1 because I'm not sure who's saying who was harmed here. But
2 maybe it just doesn't make sense.

3 But another thing swirling around is do we have
4 essentially complaints about claims trading? Claims trading?
5 And I don't know if we want to get into that or not, but
6 claims trading in bankruptcy is a pretty unregulated -- it's
7 just kind of between the claims trader and the transferee.
8 And so as far as do we have a colorable claims here, I'm
9 wondering if there's some legal briefing with regard to the
10 nature of the claims.

11 Thoughts?

12 MR. MORRIS: Well, --

13 THE COURT: Do we want to keep this solely legal
14 standard and evidence, or allow briefing of a broader nature?
15 I'm trying to be clear up front because I don't want one party
16 giving me a huge brief going into 14 issues if that's not what
17 --

18 MR. MORRIS: Yeah. And I would only say, Your Honor,
19 that this motion is, in certain respects, no different than
20 any other motion. A party files a motion, people are allowed
21 to object, there's a reply, and there's a hearing. And we
22 don't want that process to change one bit.

23 We think that there's a legal issue. If any objecting
24 party believes that there's a legal issue that they feel like
25 bringing to the Court's attention, it'll be contained in the

1 opposition brief. If Hunter Mountain wants to reply to that,
2 they may. If they don't, they don't.

3 We have a schedule. You know, we'll just ask you for a
4 one-week adjustment to take into account the latest pleadings
5 that have been filed. But otherwise, this is a motion,
6 there's an opposition, there's a reply, and there's a hearing.
7 And we really would prefer to just keep it that way.

8 MR. MCENTIRE: Well, I agree with Mr. Morris, Judge,
9 at least on the issue of the sequencing of the objection and
10 the reply.

11 We still believe that May 4th is an appropriate date and
12 we ought to keep the original schedule as they requested
13 because of the nature of the pleadings that are before the
14 Court, as I mentioned.

15 THE COURT: All right. Well, I've been scrolling
16 through the redline. I see a lot of red. I know you say some
17 of it's just rearranged, but I see a lot of red. So I think
18 their request for a little more time is appropriate.

19 So, May 11th for objections and any briefs in support of
20 objections. May 18th for a reply of Hunter Mountain and any
21 briefing in support of the reply. And then a hearing May 25th
22 or thereafter. Speak up, anyone who disagrees with this
23 scheduling.

24 MR. MCENTIRE: Our statement, I just note it for the
25 record, Your Honor.

1 So, with regard to the evidentiary issue, obviously, if
2 the Court determines that it's going to be an evidentiary
3 hearing, which we object to and oppose, I would reserve the
4 opportunity to revisit the issue of withdrawing Mr. Dondero's
5 declarations.

6 I will tell the Court, we're prepared to do so if this is
7 not an evidentiary hearing, and we do not believe it should be
8 an evidentiary hearing.

9 THE COURT: All right.

10 MR. MCENTIRE: I believe -- I think my position --

11 THE COURT: Wait. I'm hearing argument again. Right
12 now, I'm just talking about dates.

13 MR. MCENTIRE: Understood.

14 THE COURT: And May 25th or as soon thereafter as you
15 can be heard. Any opposition to that? I mean, basically, I'm
16 just asking you to speak up, Mr. Morris's suggestion of these
17 new dates: Anything you want to say about that?

18 MR. MCENTIRE: I do believe that my corporate
19 representative is going to be unavailable on May 25th, and so
20 we would ask that we keep the original schedule.

21 MR. MORRIS: Your Honor, I would propose, as an
22 alternative to the 25th, since the 26th is the Friday before
23 Memorial Day weekend, either the 30th, the 31st, or June 1st,
24 with the 31st and the 1st being ideal, so we don't have to
25 travel on the holiday weekend. I don't know what other folks'

1 schedules look like, but --

2 THE COURT: Okay.

3 MR. MORRIS: -- that seems to make sense to me.

4 THE COURT: What about May 31st or June 1st? And
5 Traci, please let me know if I'm offering something I can't.

6 THE CLERK: Judge Jernigan, will you be giving a full
7 day for the hearing? If so, neither one of those dates work.
8 You could do the day after Memorial Day, May 30th. Or Friday
9 of that week, May 2nd. I'm sorry, June 2nd.

10 MR. MORRIS: I'd prefer May 30th.

11 THE COURT: All right.

12 MR. MCENTIRE: My corporate representative -- my
13 corporate representative is not available on May 30th. He's
14 returning on the 31st from a vacation. And so, under the
15 circumstances, we would request June 2nd.

16 THE COURT: Anyone have a problem with June 2nd?

17 MR. MORRIS: Can we go -- can we go with May 24th?

18 MR. MCENTIRE: My corporate representative is out the
19 week from May 21st to May 31st.

20 THE COURT: Okay. Say again.

21 MR. MCENTIRE: I just received an --

22 MR. MORRIS: June 2nd.

23 THE COURT: Wait. Wait, wait, wait, wait. May 21st
24 through May 31st?

25 MR. MCENTIRE: Yes, ma'am.

1 THE COURT: Okay. I'm just --

2 MR. MCENTIRE: So, under the circumstances, we would
3 request --

4 THE COURT: I'm just letting you know, I am going to
5 set aside a whole day. Okay? I don't know positively is it
6 going to be evidentiary. What I'll do is, after the reply
7 briefs, shortly after May 18th, I'll notify people you're
8 going to be allowed to put on evidence or not.

9 But for your planning purposes, based on what I've looked
10 at right now, again, the *Barton Doctrine* cases by analogy, it
11 looks like the Court has discretion to hear evidence. Okay?
12 So if people want to put on evidence, they're entitled to put
13 on evidence. Okay? You don't have to. Nobody has to. But I
14 think the Court in its discretion is going to hear it.

15 So I may read the briefs and do research, and if I change
16 my mind, I'll let you all know May 19th or 20th.

17 All right. So, that being the case, it's difficult,
18 because we're trying to find a whole day just in case we need
19 the whole day. You just said your client representative,
20 which is -- who is your client representative?

21 MR. MCENTIRE: Mr. Patrick.

22 THE COURT: He's gone May 21st through 31st?

23 MR. MCENTIRE: Yes, Your Honor.

24 THE COURT: All right. Did I hear June 2nd did not
25 work for somebody else?

1 MR. MORRIS: Correct. Yeah, Your Honor. I'll be --
2 I'll be out of the country beginning the evening of the 2nd,
3 returning the following Tuesday, so whatever date that is. I
4 think the 6th. So I'd be prepared to go on the 8th or the 9th
5 of June.

6 THE COURT: Okay. So, I'm sorry, you're out the 2nd
7 through 9th? Is that what I heard?

8 MR. MORRIS: The 2nd -- the 2nd through the 6th, but
9 I wouldn't want to do it on the 7th.

10 THE COURT: Okay. Well, --

11 MR. MORRIS: Or Thursday or Friday, June 8 or 9.

12 THE COURT: Okay. Anyone have a problem with June 8
13 or 9?

14 MR. MCENTIRE: Your Honor, the 8th is vastly
15 superior, but I will confess the 9th is a college friend who
16 will be staying at my house with my wife and kids, and my wife
17 shouldn't be subjected to having to host him, but -- so if the
18 8th is available, I will beg for the Court's indulgence. But
19 I'll be here on the 9th if that's requested.

20 THE COURT: Okay. Everyone good, --

21 MR. MCENTIRE: I might need a note.

22 THE COURT: -- June 8th? Everybody good with that?

23 Okay. I'm hearing no objection. Traci, am I available?

24 THE CLERK: Yes. You have a Chapter 13 docket that
25 afternoon, but I am sure we can work something out with Mr.

1 Powers.

2 THE COURT: Okay. So --

3 MR. MCENTIRE: Your Honor? Your Honor, this is
4 Sawnie McEntire. For the record, I do need to lodge my
5 objection, but I understand the conflicts. And so, subject to
6 my objection, we agree to that date.

7 THE COURT: All right. So we'll start 9:30 in the
8 morning, June 8th. And so I'm going to look for a scheduling
9 order that uses these revised dates that I think I've heard
10 you all will live with. May 11th for objections to the motion
11 for leave, and that will include any briefs in support of the
12 objections. And then May 18th for Hunter Mountain's reply and
13 any briefing in the reply that responds to the objections.
14 And shortly after that my courtroom deputy will let lawyers
15 know, yes, she's going to hear evidence, or no, she's not
16 going to have evidence. And the hearing will be June 8th at
17 9:30 in the morning.

18 Any other housekeeping matters while we are here? I mean,
19 these are the only pleadings that are going to be allowed.
20 How about that, among other things, as a housekeeping matter?
21 Just these pleadings, except, obviously, if we have live
22 witnesses and evidence on the 8th, you'll be bound by the
23 Local Rule that says witness and exhibit lists are due three
24 days before. Anything else that you all can think of?

25 MR. MORRIS: Your Honor, if I may, I greatly

1 appreciate your patience today. But I did want to just
2 inquire as to the status of the decisions on the SE
3 Multifamily HCRE matter as well as the motion to dismiss that
4 was argued back in January. Not because I intentionally or
5 unintentionally seek to pressure the Court, but I do think
6 that those decisions will be helpful one way or the other
7 resolving, you know, or getting some clarity in this case.

8 THE COURT: All right. Well, the next of those two
9 items that comes out will be the SE Multihousing matter. My
10 law clerk that's working on that is right over here to my
11 right. And we think before the end of the week, but we are
12 juggling lots of things, as you might imagine. So that one is
13 next, and I'm hesitating to give you a time estimate on the
14 other one, but it'll be next in the queue. We've had lots of
15 different adversary proceedings in other cases that we've had
16 to --

17 MR. MORRIS: Yeah.

18 THE COURT: -- work on. But I think, again, SE is
19 probably towards the end of this week.

20 MR. MORRIS: All right. We appreciate the guidance,
21 Your Honor.

22 THE COURT: Okay. She's giving me a thumbs up like
23 I'm not overpromising. You can't see her from the video.

24 All right. So, everyone clear? I want to say in the
25 strongest terms that I don't want an avalanche of pleadings.

1 Is everyone a hundred percent clear that we get the objections
2 with supportive briefing May 11th, reply with supportive
3 briefing on the 18th, and that's it? That's it. Other than
4 witness and exhibit lists, --

5 MR. MORRIS: Yes, Your Honor.

6 THE COURT: -- if we have evidence. Everybody clear?
7 Any questions?

8 MR. MCENTIRE: No, ma'am. Thank you. Thank you for
9 your time.

10 THE COURT: Okay. Thank you. We are adjourned.

11 THE CLERK: All rise.

12 (Proceedings concluded at 3:12 p.m.)

13 --oOo--

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CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

04/25/2023

24

25

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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EXHIBITS

-none-

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004639

LITIGATION SUB-TRUST AGREEMENT

This Litigation Sub-Trust Agreement, effective as of August 16, 2021 (as may be amended, supplemented, or otherwise modified in accordance with the terms hereof, this “Agreement”), by and among James P. Seery, Jr., as trustee of the Highland Claimant Trust (the “Claimant Trust”), Wilmington Trust, National Association, a national banking association (“WTNA”), as Delaware Trustee (in such capacity hereunder, and not in its individual capacity, the “Delaware Trustee”), and Marc S. Kirschner as trustee (the “Litigation Trustee,” and together with the Claimant Trust and Delaware Trustee, the “Parties”) of the Litigation Sub-Trust for the benefit of the Claimant Trust as sole Litigation Sub-Trust Beneficiary.

RECITALS

WHEREAS, on October 16, 2019, Highland Capital Management, L.P. (the “Debtor”) filed with the United States Bankruptcy Court for the District of Delaware, a voluntary petition for relief under chapter 11 of the Bankruptcy Code, which case was subsequently transferred to the Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Bankruptcy Court”) and captioned *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj11 (the “Chapter 11 Case”);

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (as may be amended, supplemented, or otherwise modified from time to time, the “Plan”),¹ which was confirmed by the Bankruptcy Court on February 22, 2021, pursuant to the *Findings of Fact and Order Confirming Plan of Reorganization for the Debtor* [Docket No. 1943] (the “Confirmation Order”);

WHEREAS, this Agreement, including all exhibits hereto, is the “Litigation Sub-Trust Agreement” described in the Plan and shall be executed on or before the Effective Date in order to facilitate implementation of the Plan; and

WHEREAS, pursuant to the Plan and Confirmation Order, the Litigation Sub-Trust Assets are hereby to be transferred by the Claimant Trust to the Litigation Sub-Trust (each as defined herein) created and evidenced by this Agreement so that (i) Estate Claims can be investigated, prosecuted, settled, abandoned, resolved, and otherwise monetized as may be determined by the Litigation Trustee in accordance with the terms of the Litigation Sub-Trust Agreement; (ii) proceeds of Estate Claims can be remitted to the Claimant Trust as Claimant Trust Assets for distribution to the Claimant Trust Beneficiaries (as defined in the Claimant Trust Agreement) in accordance with the Plan and Claimant Trust Agreement; (iii) the Litigation Trustee can investigate, litigate, settle, or otherwise resolve any Filed Claims relating to the Estate Claims, including the Employee Claims; and (iv) administrative services relating to the activities of the Litigation Sub-Trust can be performed by the Litigation Trustee.

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan. The confirmed Plan included certain amendments filed on February 1, 2021. See *Debtor’s Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)*, Docket No. 1875, Exh. B.

DECLARATION OF TRUST

NOW, THEREFORE, in order to declare the terms and conditions hereof, and in consideration of the premises and mutual agreements herein contained, the confirmation of the Plan and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Litigation Trustee and the Claimant Trustee have executed this Agreement for the benefit of the Claimant Trust as provided for in the Plan.

TO HAVE AND TO HOLD unto the Litigation Trustee and his successors or assigns in trust, under and subject to the terms and conditions set forth herein and for the benefit of the Claimant Trust, and for the performance of and compliance with the terms hereof and of the Plan; provided, however, that upon termination of the Litigation Sub-Trust in accordance with Article IX hereof, this Litigation Trust Agreement shall cease, terminate, and be of no further force and effect, unless otherwise specifically provided for herein.

IT IS FURTHER COVENANTED AND DECLARED that the Litigation Sub-Trust Assets are to be strictly held and applied by the Litigation Trustee subject to the specific terms set forth below.

ARTICLE I. **DEFINITION AND TERMS**

1.1 Certain Definitions. Unless the context shall otherwise require and except as contained in this Section 1.1 or as otherwise defined herein, the capitalized terms used herein shall have the respective meanings assigned thereto in the “Definitions,” Section 1.1 of the Plan or if not defined therein, shall have the meanings assigned thereto in the applicable Section of the Plan. For all purposes of this Agreement, the following terms shall have the following meanings:

- (a) “Bankruptcy Court” has the meaning set forth in the Recitals hereof.
- (b) “Cause” means (i) a Person’s willful failure to perform his material duties hereunder (which material duties shall include, without limitation, regular attendance at regularly scheduled meetings of the Oversight Board), which is not remedied within 30 days of notice; (ii) a Person’s commission of an act of fraud, theft, or embezzlement during the performance of his or her duties hereunder; (iii) a Person’s conviction of a felony with all appeals having been exhausted or appeal periods lapsed; or (iv) a Person’s gross negligence, bad faith, willful misconduct, or knowing violation of law in the performance of his or her duties hereunder.
- (c) “Claimant Trust Agreement” means the Claimant Trust Agreement dated August 11, 2021, by and between the Debtor, Claimant Trustee, and Wilmington Trust, National Association, as Delaware trustee thereunder.
- (d) “Claimant Trustee” means James P. Seery, Jr., as the initial “Claimant Trustee” under the Claimant Trust Agreement and as defined in the Plan, and any successor Claimant Trustee who may be appointed pursuant to the terms of the Claimant Trust Agreement.

(e) “Claimant Trust” means the “Highland Claimant Trust” established in accordance with the Delaware Statutory Trust Act and Treasury Regulation Section 301.7701-4(d) pursuant to the Claimant Trust Agreement.

(f) “Delaware Statutory Trust Act” means the Delaware Statutory Trust Act 12 Del C. §3801, et seq. as amended from time to time.

(g) “Delaware Trustee” has the meaning set forth in the introduction hereof.

(h) “Disability” means as a result of the Litigation Trustee’s incapacity due to physical or mental illness as determined by an accredited physician or psychologist, as applicable, selected by the Litigation Trustee, the Litigation Trustee has been substantially unable to perform his or her duties hereunder for three (3) consecutive months or for an aggregate of 180 days during any period of twelve (12) consecutive months.

(i) “Estate Claims” has the meaning given to it in Exhibit A to the *Notice of Final Term Sheet* [Docket No. 354].

(j) “Employee” means the employees of the Debtor set forth in the Plan Supplement.

(k) “Employee Claims” means any General Unsecured Claim held by an Employee other than the Claims of the Senior Employees subject to stipulations (provided such stipulations are executed by any such Senior Employee of the Debtor prior to the Effective Date).

(l) “Litigation Sub-Trust” means the sub-trust created pursuant to this Agreement, and in accordance with the Delaware Statutory Trust Act and Treasury Regulation Section 301.7701-4(d).

(m) “Litigation Sub-Trust Agreement” means this Agreement.

(n) “Litigation Sub-Trust Assets” means the Estate Claims and the Litigation Sub-Trust Expense Cash Reserve.

(o) “Litigation Sub-Trust Beneficiary” means the Claimant Trust.

(p) “Litigation Sub-Trust Expenses” means the costs, expenses, liabilities and obligations incurred by the Litigation Sub-Trust and/or the Litigation Trustee in administering and conducting the affairs of the Litigation Sub-Trust, and otherwise carrying out the terms of the Litigation Sub-Trust and the Plan on behalf of the Litigation Sub-Trust, including without any limitation, any taxes owed by the Litigation Sub-Trust, and the fees and expenses of the Litigation Trustee and professional persons retained by the Litigation Sub-Trust or Litigation Trustee in accordance with Article 3.12(b) of this Agreement.

(q) “Litigation Sub-Trust Expense Cash Reserve” means \$1.5 million in Cash to be funded by the Debtor or Reorganized Debtor, as applicable, pursuant to the Plan into a bank account of the Litigation Sub-Trust (or of the Claimant Trust for the benefit of the Litigation Sub-

Trust) on or before the Effective Date for the purpose of paying Litigation Sub-Trust Expenses in accordance herewith.

(r) “Litigation Trustee” means Marc S. Kirschner as the initial “Litigation Trustee” hereunder and under the Plan, and any successor Litigation Trustee who may be appointed pursuant to the terms of this Agreement.

(s) “Oversight Board” has the meaning set forth in the Claimant Trust Agreement.

(t) “Plan” has the meaning set forth in the Recitals hereof.

(u) “Privileges” means the Debtor’s rights, title and interests in and to any privilege or immunity attaching to any documents or communications (whether written or oral) associated with any of the Estate Claims or Employee Claims, including, without limitation, to, attorney-client privilege and work-product privilege as defined in Rule 502(g) of the Federal Rules of Evidence; provided, however, that “Privileges” shall not include the work-product privilege of any non-Employee attorney or attorneys that has not been previously shared with the Debtor or any of its employees and the work-product privilege shall remain with the non-Employee attorney or attorneys who created such work product so long as it has not been previously shared with the Debtor or any of its employees, or otherwise waived.

(v) “Securities Act” means the Securities Act of 1933, as amended.

(w) “TIA” means the Trust Indenture Act of 1939, as amended.

(x) “Trust Interests” means the trust interest(s) to be distributed to the Claimant Trust as the sole Litigation Sub-Trust Beneficiary.

(y) “Trust Register” has the meaning given to it in Section 5.3(b) hereof.

1.2 General Construction. As used in this Agreement, the masculine, feminine and neuter genders, and the plural and singular numbers shall be deemed to include the others in all cases where they would apply. “Includes” and “including” are not limiting and “or” is not exclusive. References to “Articles,” “Sections” and other subdivisions, unless referring specifically to the Plan or provisions of the Bankruptcy Code, the Bankruptcy Rules, or other law, statute or regulation, refer to the corresponding Articles, Sections and other subdivisions of this Agreement, and the words “herein,” “hereafter” and words of similar import refer to this Agreement as a whole and not to any particular Article, Section, or subdivision of this Agreement. Amounts expressed in dollars or following the symbol “\$” shall be deemed to be in United States dollars. References to agreements or instruments shall be deemed to refer to such agreements or instruments as the same may be amended, supplemented, or otherwise modified in accordance with the terms thereof.

1.3 Incorporation of the Plan. The Plan is hereby incorporated into this Agreement and made a part hereof by this reference.

ARTICLE II.
ESTABLISHMENT OF THE LITIGATION SUB-TRUST

2.1 Establishment of Sub-Trust.

(a) The Parties, pursuant to the Plan and the Confirmation Order and in accordance with the applicable provisions of the Bankruptcy Code, hereby establish a statutory trust under the Delaware Statutory Trust Act on behalf of the Claimant Trust as the sole Litigation Sub-Trust Beneficiary, which shall be known as the “Highland Litigation Sub-Trust,” on the terms set forth herein. The Litigation Trustee may use this name in accordance with the terms and conditions set forth herein as the Litigation Trustee sees fit.

(b) The Litigation Trustee shall cause to be executed and filed in the office of the Secretary of State of the State of Delaware the Certificate of Trust and agree to execute, acting solely in his capacity as Litigation Trustee, such certificates as may from time to time be required under the Delaware Statutory Trust Act or any other Delaware law.

2.2 Nature and Purposes of the Litigation Sub-Trust. The Litigation Sub-Trust is organized and established as a trust for the purpose of monetizing the Estate Claims and making distributions to Litigation Sub-Trust Beneficiary in a manner consistent with “liquidating trust” status under Treasury Regulation Section 301.7701-4(d). The Litigation Sub-Trust shall serve as a mechanism for investigating, prosecuting, settling, resolving, and otherwise monetizing all Estate Claims and distributing the proceeds of such Estate Claims to the Claimant Trust in a timely fashion in accordance with the Plan, the Confirmation Order, and this Agreement. The Litigation Sub-Trust and Litigation Trustee shall have and retain any and all rights, defenses, cross-claims and counter-claims held by the Debtor with respect to any Estate Claim as of the Petition Date. Except as otherwise provided herein, the Litigation Sub-Trust shall have the sole responsibility for the pursuit and settlement of the Estate Claims, and, subject to the terms of the Claimant Trust Agreement, the sole power and authority to allow or settle and compromise any Claims related to the Estate Claims, including, without limitation, Employee Claims. For the avoidance of doubt, the Litigation Sub-Trust, pursuant to section 1123(b)(3)(B) of the Bankruptcy Code and applicable state trust law, is appointed as the successor-in-interest to, and representative of, the Debtor and its Estate for the retention, enforcement, settlement, and adjustment of all Estate Claims and Employee Claims (in accordance with the terms of the Claimant Trust Agreement).

2.3 Transfer of Assets and Rights to the Litigation Sub-Trust.

(a) On or as soon as practicable after the Effective Date, the Claimant Trust shall automatically and irrevocably transfer, assign, and deliver, and shall be deemed to have transferred, assigned, and delivered, all Estate Claims, Employee Claims, and Privileges. For purposes of the transfer of documents, the Litigation Sub-Trust is an assignee and successor to the Debtor in respect of the Estate Claims and Employee Claims and shall be treated as such in any review of confidentiality restrictions in requested documents. For the avoidance of doubt, following the Effective Date, the Litigation Trustee shall have the power to waive the Privileges being so assigned and transferred.

(b) Until the Litigation Sub-Trust terminates pursuant to the terms hereof, legal title to the Estate Claims shall be vested at all times in the Litigation Sub-Trust as a separate legal entity, except where applicable law in any jurisdiction requires title to any part of the Estate Claims to be vested in the Litigation Trustee, in which case title shall be deemed to be vested in the Litigation Trustee, solely in his capacity as Litigation Trustee. For purposes of such jurisdictions, the term Litigation Sub-Trust, as used herein, shall be read to mean the Litigation Trustee.

(c) In accordance with section 1123(d) of the Bankruptcy Code, the Litigation Trustee may enforce all rights to commence and pursue, as appropriate, any and all Estate Claims after the Effective Date. No Person or entity may rely on the absence of a specific reference in the Plan to any Estate Claim against them as any indication that the Litigation Trustee will not pursue any and all available Estate Claims or objections against them. Unless any Estate Claim against a Person or Entity are expressly waived, relinquished, exculpated, released, compromised, or settled in the Plan or an order of the Bankruptcy Court, the Litigation Trustee expressly reserves all Estate Claims for later adjudication, and, therefore, no preclusion doctrine including the doctrine of res judicata, collateral, estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable, or otherwise), or laches, shall apply to such Estate Claims upon, after, or as a consequence of the Confirmation Order.

2.4 Principal Office. The principal office of the Litigation Sub-Trust shall be maintained by the Litigation Trustee at the following address: Goldin Associates, a Teneo Company, 350 Fifth Avenue, New York, New York 10118.

2.5 Acceptance. The Litigation Trustee accepts the Litigation Sub-Trust imposed by this Agreement and agrees to observe and perform that Litigation Sub-Trust, on and subject to the terms and conditions set forth herein and in the Plan.

2.6 Further Assurances. The Claimant Trustee and any successors thereof will, upon reasonable request of the Litigation Trustee, execute, acknowledge and deliver such further instruments and do such further acts as may be necessary or proper to transfer to the Litigation Trustee any portion of the Claimant Trust Assets intended to be conveyed hereby and in the Plan in the form and manner provided for hereby and in the Plan and to vest in the Litigation Trustee the powers, instruments or funds in trust hereunder.

2.7 Incidents of Ownership. The Claimant Trust shall be the sole beneficiary of the Litigation Sub-Trust and the Litigation Trustee shall retain only such incidents of ownership as are necessary to undertake the actions and transactions authorized herein.

ARTICLE III.

THE LITIGATION TRUSTEE AND THE DELAWARE TRUSTEE

3.1 Role. In furtherance of and consistent with the purpose of the Litigation Sub-Trust, the Plan, and this Agreement, the Litigation Trustee, subject to the terms and conditions contained herein, in the Plan, and in the Confirmation Order, shall serve as Litigation Trustee with respect to the Litigation Sub-Trust Assets for the benefit of the Litigation Sub-Trust Beneficiary and maintain, manage, and take action on behalf of the Litigation Sub-Trust.

3.2 Authority.

(a) In connection with the administration of the Litigation Sub-Trust, in addition to any and all of the powers enumerated elsewhere herein, the Litigation Trustee shall, in an expeditious but orderly manner, investigate, prosecute, settle, and otherwise resolve the Estate Claims. The Litigation Trustee shall have the power and authority and is authorized to perform any and all acts necessary and desirable to accomplish the purposes of this Agreement and the provisions of the Plan and the Confirmation Order relating to the Litigation Sub-Trust, within the bounds of this Agreement, the Plan, the Confirmation Order, and applicable law.

(b) The Litigation Trustee, subject to the limitations set forth in Section 3.3 of this Agreement shall have the right to prosecute, defend, compromise, adjust, arbitrate, abandon, estimate, or otherwise deal with and settle any and all Estate Claims and Employee Claims (in accordance with the terms of the Claimant Trust Agreement). To the extent that any action has been taken to prosecute, defend, compromise, adjust, arbitrate, abandon, or otherwise deal with and settle any such Estate Claims or Employee Claims prior to the Effective Date, on the Effective Date the Litigation Trustee shall be substituted for the Debtor in connection therewith in accordance with Rule 25 of the Federal Rules of Civil Procedure, made applicable by Rule 7025 of the Federal Rules of Bankruptcy Procedure, and the caption with respect to such pending action shall be changed to the following “Marc Kirschner, not individually but solely as Litigation Trustee for the Highland Litigation Sub-Trust, et al. v. [Defendant]”.

(c) Subject in all cases to any limitations contained herein, in the Confirmation Order, or in the Plan, the Litigation Trustee shall have the power and authority to:

(i) hold legal title to any and all rights in or arising from the Litigation Sub-Trust Assets, including, but not limited to, the right to collect any and all money and other property belonging to the Litigation Sub-Trust (including any proceeds of the Litigation Sub-Trust Assets);

(ii) perform the duties, exercise the powers, and asserts the rights of a trustee under sections 1123(b)(3)(B) of the Bankruptcy Code with respect to the Litigation Sub-Trust Assets, including the right to assert claims, defenses, offsets, and privileges;

(iii) subject to any approval of the Oversight Board that may be required under Section 3.3(b), protect and enforce the rights of the Litigation Sub-Trust with respect to any Litigation Sub-Trust Assets by any method deemed appropriate, including, without limitation, by judicial proceeds, or pursuant to any applicable bankruptcy, insolvency, moratorium, or similar law and general principles of equity;

(iv) determine and satisfy any and all liabilities created, incurred, or assumed by the Litigation Sub-Trust;

(v) subject to any approval of the Oversight Board that may be required under Section 3.3(b), investigate, analyze, compromise, adjust, arbitrate, mediate, sue on or defend, prosecute, abandon, dismiss, exercise rights, powers and privileges with respect to or otherwise deal with and settle, in accordance with the terms set forth in this Agreement, all Estate

Claims, Employee Claims, or any other Causes of Action in favor of or against the Litigation Sub-Trust;

(vi) with respect to any Estate Claim, avoid and recover transfers of the Debtor's property as may be permitted by the Bankruptcy Code or applicable state law;

(vii) subject to applicable law, seek the examination of any Entity or Person with respect to the Estate Claims;

(viii) make all payments relating to the Litigation Sub-Trust Assets;

(ix) assess, enforce, release, or waive any privilege or defense on behalf of the Litigation Sub-Trust, the Litigation Sub-Trust Assets, or the Litigation Sub-Trust Beneficiary, if applicable;

(x) prepare, or have prepared, and file, if necessary, with the appropriate taxing authority any and all tax returns, information returns, and other required documents with respect to the Litigation Sub-Trust, and pay taxes properly payable by the Litigation Sub-Trust;

(xi) if not otherwise covered by insurance coverage obtained by the Claimant Trust, obtain reasonable insurance coverage with respect to any liabilities and obligations of the Litigation Trustee, solely in his capacity as such, in the form of fiduciary liability insurance, a directors and officers policy, an errors and omissions policy, or otherwise. The cost of any such insurance shall be a Litigation Sub-Trust Expense and paid by the Litigation Trustee from the Litigation Sub-Trust Expense Reserve;

(xii) without further order of the Bankruptcy Court, but subject to the terms of this Agreement, employ various consultants, third-party service providers, and other professionals, including counsel, tax advisors, consultants, brokers, investment bankers, valuation counselors, and financial advisors, as the Litigation Trustee deems necessary to aid him in fulfilling his obligations under this Agreement; such consultants, third-party service providers, and other professionals shall be retained pursuant to whatever fee arrangement the Litigation Trustee deems appropriate, including contingency fee arrangements and any fees and expenses incurred by such professionals engaged by the Litigation Trustee shall be Litigation Sub-Trust Expenses and paid by the Litigation Trustee from the Litigation Sub-Trust Expense Cash Reserve;

(xiii) to the extent applicable, assert, enforce, release, or waive any Privilege or defense on behalf of the Litigation Sub-Trust (including as to any Privilege that the Debtor held prior to the Effective Date), including to provide any information to insurance carriers that the Litigation Trustee deems necessary to utilize applicable insurance coverage for any Claim or Claims;

(xiv) take all steps and execute all instruments and documents necessary to effectuate the purpose of the Litigation Sub-Trust and the activities contemplated herein and in the Confirmation Order and the Plan, and take all actions necessary to comply with the Confirmation Order, the Plan, and this Agreement and the obligations thereunder and hereunder; and

(xv) exercise such other powers and authority as may be vested in or assumed by the Litigation Trustee by any Final Order (the foregoing subparagraphs (i)-(xv) being collectively, the “Authorized Acts”).

(d) The Litigation Trustee has the power and authority to act as trustee of the Litigation Sub-Trust and perform the Authorized Acts through the date such Litigation Trustee resigns, is removed, or is otherwise unable to serve for any reason.

(e) Any determinations by the Liquidation Trustee, under the direction of the Oversight Board, with respect to the amount or timing of settlement or other disposition of any Estate Claims settled in accordance with the terms of this Agreement shall be conclusive and binding on the Litigation Sub-Trust Beneficiary and all other parties of interest following the entry of an order of a court of competent jurisdiction approving such settlement or other disposition to the extent required or obtained.

3.3 Limitation of Authority.

(a) Notwithstanding anything herein to the contrary, the Litigation Sub-Trust and the Litigation Trustee shall not (i) be authorized to engage in any trade or business, (ii) take any actions inconsistent with the management of the Estate Claims as required or contemplated by applicable law, the Confirmation Order, the Plan, and this Agreement, or (iii) take any action in contravention of the Confirmation Order, the Plan, or this Agreement.

(b) Notwithstanding anything herein to the contrary, and in no way limiting the terms of the Plan, the Litigation Trustee must receive the consent by vote of a simple majority of the Oversight Board pursuant to the notice and quorum requirements set forth in Section 4.6 of the Claimant Trust Agreement, in order to:

- (i) terminate or extend the term of the Litigation Sub-Trust;
- (ii) commence litigation with respect to any Estate Claims and, if applicable under the terms of the Claimant Trust Agreement, the Employee Claims, including, without limitation, to (x) litigate, resolve, or settle coverage and/or the liability of any insurer under any insurance policy or legal action related thereto, or (y) pursue avoidance, recovery, or similar remedies that may be brought under chapter 5 of the Bankruptcy Code or under similar or related state or federal statutes or common law, including fraudulent transfer law;
- (iii) settle, dispose of, or abandon any Estate Claims (including any counterclaims to the extent such counterclaims are set off against the proceeds of any such Estate Claim);
- (iv) borrow funds as may be necessary to fund litigation or other costs of the Litigation Sub-Trust;
- (v) reserve or retain any cash or cash equivalents in the Litigation Sub-Trust Cash Reserve in an amount reasonably necessary to meet claims and contingent liabilities;
- (vi) change the compensation of the Litigation Trustee; and

(vii) retain counsel, experts, advisors, or any other professionals.

(c) [Reserved]

3.4 Binding Nature of Actions. All actions taken and determinations made by the Litigation Trustee in accordance with the provisions of this Agreement shall be final and binding upon the Litigation Sub-Trust Beneficiary.

3.5 Term of Service. The Litigation Trustee shall serve as the Litigation Trustee for the duration of the Litigation Sub-Trust, subject to death, resignation or removal.

3.6 Resignation. The Litigation Trustee may resign as trustee of the Litigation Sub-Trust by an instrument in writing delivered to the Bankruptcy Court and Oversight Board at least thirty (30) days before the proposed effective date of resignation. The Litigation Trustee shall continue to serve as Litigation Trustee after delivery of the Litigation Trustee's resignation until the proposed effective date of such resignation, unless the Litigation Trustee and a [simple majority] of the Oversight Board consent to an earlier effective date, which earlier effective date shall be no earlier than the date of appointment of a successor Litigation Trustee in accordance with Section 3.8 hereof becomes effective.

3.7 Removal.

(a) The Litigation Trustee may be removed by a simple majority vote of the Oversight Board for Cause, immediately upon notice thereof, or without Cause, upon 60 days' prior written notice.

(b) To the extent there is any dispute regarding the removal of a Litigation Trustee (including any dispute relating to any compensation or expense reimbursement due under this Agreement) the Bankruptcy Court shall retain jurisdiction to consider and adjudicate such dispute. Notwithstanding the foregoing, the Litigation Trustee will continue to serve as the Litigation Trustee after his removal until the earlier of (i) the time when a successor Litigation Trustee will become effective in accordance with Section 3.8 of this Agreement or (ii) such date as the Bankruptcy Court otherwise orders.

3.8 Appointment of Successor.

(a) Appointment of Successor. In the event of a vacancy by reason of the death, Disability, or removal of the Litigation Trustee, or prospective vacancy by reason of resignation, a successor Litigation Trustee shall be selected by a [simple majority] vote of the Oversight Board. If Members of the Oversight Board are unable to secure a majority vote, the Bankruptcy Court will determine the successor Litigation Trustee on motion of the Members. If a final decree has been entered closing the Chapter 11 Case, the Litigation Trustee may seek to reopen the Chapter 11 Case for the limited purpose of determining the successor Litigation Trustee, and the costs for such motion and costs related to re-opening the Chapter 11 Case shall be paid by the Litigation Sub-Trust, or the Claimant Trust on behalf of the Litigation Sub-Trust. The successor Litigation Trustee shall be appointed as soon as practicable, but in any event no later than sixty (60) days after the occurrence of the vacancy or, in the case of resignation, on the effective date of the resignation of the then acting Litigation Trustee.

(b) Vesting or Rights in Successor Litigation Trustee. Every successor Litigation Trustee appointed hereunder shall execute, acknowledge, and deliver to the Litigation Sub-Trust, the Claimant Trustee, the exiting Litigation Trustee, the Oversight Board, and file with the Bankruptcy Court, an instrument accepting such appointment subject to the terms and provisions hereof. The successor Litigation Trustee, without any further act, deed, or conveyance shall become vested with all the rights, powers, trusts and duties of the exiting Litigation Trustee except that the successor Litigation Trustee shall not be liable for the acts or omissions of the retiring Litigation Trustee. In no event shall the retiring Litigation Trustee be liable for the acts or omissions of the successor Litigation Trustee.

(c) Interim Litigation Trustee. During any period in which there is a vacancy in the position of Litigation Trustee, the Oversight Board shall appoint one of its Members or the Claimant Trustee to serve as the interim Litigation Trustee (the “Interim Trustee”) until a successor Litigation Trustee is appointed pursuant to Section 3.8(a). The Interim Trustee shall be subject to all the terms and conditions applicable to a Litigation Trustee hereunder. Such Interim Trustee shall not be limited in any manner from exercising any rights or powers as a Member of the Oversight Board or Claimant Trustee, as applicable, merely by such Person’s appointment as Interim Trustee.

3.9 Continuance of Litigation Sub-Trust. The death, resignation, or removal of the Litigation Trustee shall not operate to terminate the Litigation Sub-Trust created by this Agreement or to revoke any existing agency (other than any agency of the Litigation Trustee as the Litigation Trustee) created pursuant to the terms of this Agreement or invalidate any action taken by the Litigation Trustee. In the event of the resignation or removal of the Litigation Trustee, the Litigation Trustee shall promptly (i) execute and deliver, by the effective date of resignation or removal, such documents, instruments, records, and other writings as may be reasonably requested by his successor to effect termination of the exiting Litigation Trustee’s capacity under this Agreement and the conveyance of the Estate Claims then held by the exiting Litigation Trustee to the successor Litigation Trustee; (ii) deliver to the successor Litigation Trustee all non-privileged documents, instruments, records, and other writings relating to the Litigation Sub-Trust as may be in the possession or under the control of the exiting Litigation Trustee, provided, the exiting Litigation Trustee shall have the right to make and retain copies of such documents, instruments, records and other writings delivered to the successor Litigation Trustee and the cost of making such copies shall be a Litigation Sub-Trust Expense to be paid by the Litigation Sub-Trust; and (iii) otherwise assist and cooperate in effecting the assumption of the exiting Litigation Trustee’s obligations and functions by his successor, provided the fees and expenses of such assistance and cooperation shall be paid to the exiting Litigation Trustee by the Litigation Sub-Trust. The exiting Litigation Trustee shall irrevocably appoint the successor Litigation Trustee as his attorney-in-fact and agent with full power of substitution for it and its name, place and stead to do any and all acts that such exiting Litigation Trustee is obligated to perform under this Section 3.9.

3.10 Litigation Trustee as “Estate Representative”. The Litigation Trustee will be the exclusive trustee of the Litigation Sub-Trust Assets, for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code (the “Estate Representative”) with respect to the Estate Claims, with all rights and powers attendant thereto, in addition to all rights and powers granted in the Plan and in this Agreement. The Litigation Trustee will be the successor-in-interest to the

Debtor with respect to any action pertaining to the Estate Claims, which was or could have been commenced by the Debtor prior to the Effective Date, except as otherwise provided in the Plan or Confirmation Order. All actions, claims, rights or interests constituting or relating to Estate Claims are preserved and retained and may be enforced by the Litigation Trustee as an Estate Representative.

3.11 Books and Records.

(a) The Litigation Trustee shall maintain, in respect of the Litigation Sub-Trust and the Claimant Trust, books and records pertinent to Estate Claims in its possession and the income of the Litigation Sub-Trust and payment of expenses, liabilities, and claims against or assumed by the Litigation Sub-Trust in such detail and for such period of time as may be necessary to enable it to make full and proper accounting in respect thereof. Such books and records shall be maintained as reasonably necessary to facilitate compliance with the tax reporting requirements of the Litigation Sub-Trust and the requirements of Article VII herein. Except as otherwise provided herein, nothing in this Agreement requires the Litigation Trustee to file any accounting or seek approval of any court with respect to the administration of the Litigation Sub-Trust, or as a condition for managing any payment or distribution out of the Litigation Sub-Trust. Notwithstanding the foregoing, the Litigation Trustee shall to retain such books and records, and for such periods, with respect to any Reorganized Debtor Assets as are required to be retained pursuant to Section 204-2 of the Investment Advisers Act or any other applicable laws, rules, or regulations.

(b) The Litigation Trustee may dispose some or all of the books and records maintained by the Litigation Trustee at the later of (i) such time as the Litigation Trustee determines, with the unanimous consent of the Oversight Board, that the continued possession or maintenance of such books and records is no longer necessary for the benefit of the Litigation Sub-Trust, including with respect to the Estate Claims, or (ii) upon the termination and winding up of the Litigation Sub-Trust under Article IX of this Agreement.

3.12 Reports.

(a) Financial and Status Reports. The fiscal year of the Litigation Sub-Trust shall be the calendar year. Within 90 days after the end of each calendar year during the term of the Litigation Sub-Trust, and within 45 days after the end of each calendar quarter during (other than the fourth quarter) the term of the Litigation Sub-Trust and as soon as practicable upon termination of the Litigation Sub-Trust, the Litigation Trustee shall make available upon request to the Oversight Board or Litigation Sub-Trust Beneficiary appearing on its records as of the end of such period or such date of termination, a written report including: (i) unaudited financial statements of the Litigation Sub-Trust for such period, and, if the end of a calendar year, an unaudited report (which may be prepared by an independent certified public accountant employed by the Litigation Trustee) reflecting the result of such agreed-upon procedures relating to the financial accounting administration of the Litigation Sub-Trust as proposed by the Litigation Trustee; (ii) a summary description of any action taken by the Litigation Sub-Trust that, in the judgment of the Litigation Trustee, materially affects the Litigation Sub-Trust and of which notice has not previously been given to the Oversight Board or Litigation Sub-Trust Beneficiary, provided, that any such description shall not include any privileged or confidential information of

the Litigation Trustee; and (iii) a description of the progress of liquidating the Litigation Sub-Trust Assets and making distributions to the Litigation Sub-Trust Beneficiary and any other material information relating to the Litigation Sub-Trust Assets and the administration of the Litigation Sub-Trust deemed appropriate to be disclosed by the Litigation Trustee, which description shall include a written report detailing, among other things, the litigation status of the Estate Claims transferred to the Litigation Sub-Trust, any settlements entered into by the Litigation Sub-Trust with respect to the Estate Claims, the proceeds recovered to date from Estate Claims, and the distributions made by the Litigation Sub-Trust.

(b) Annual Plan and Budget. If instructed by the Oversight Board, the Litigation Trustee shall prepare and submit to the Oversight Board for approval an annual plan and budget in such detail as reasonably requested.

3.13 Compensation and Reimbursement; Engagement of Professionals.

(a) Compensation and Expenses.

(i) Compensation. As compensation for any services rendered by the Litigation Trustee in connection with this Agreement, the Litigation Trustee shall receive initial compensation in a manner and amount as agreed upon by the Committee. Any additional compensation or compensation of a Successor Litigation Trustee shall be determined by the Oversight Board.

(ii) Expense Reimbursements. All reasonable out-of-pocket expenses of the Litigation Trustee in the performance of his or her duties hereunder, shall be reimbursed as Litigation Sub-Trust Expenses paid by the Litigation Sub-Trust.

(b) Professionals.

(i) Engagement of Professionals. The Litigation Trustee shall engage professionals from time to time in conjunction with the services provided hereunder. The Litigation Trustee's engagement of such professionals shall be approved by a majority of the Oversight Board as set forth in Section 3.3(b) hereof.

(ii) Fees and Expenses of Professionals. The Litigation Trustee shall pay the reasonable fees and expenses of any retained professionals as Litigation Sub-Trust Expenses.

3.14 Reliance by Litigation Trustee. Except as otherwise provided herein, the Litigation Trustee may rely, and shall be fully protected in acting or refraining from acting, on any resolution, statement, certificate, instrument, opinion, report, notice, request, consent, order or other instrument or document that the Litigation Trustee has no reason to believe to be other than genuine and to have been signed or presented by the proper party or parties or, in the case of facsimiles, to have been sent by the proper party or parties, and the Litigation Trustee may conclusively rely as to the truth of the statements and correctness of the opinions or direction expressed therein. The Litigation Trustee may consult with counsel and other professionals, and any advice of such counsel or other professionals shall constitute full and complete authorization and protection in respect of any action taken or not taken by the Litigation Trustee in accordance therewith. The

Litigation Trustee shall have the right at any time to seek instructions from the Bankruptcy Court, or any other court of competent jurisdiction concerning Estate Claims, this Agreement, the Plan, or any other document executed in connection therewith, and any such instructions given shall be full and complete authorization in respect of any action taken or not taken by the Litigation Trustee in accordance therewith. The Litigation Sub-Trust shall have the right to seek Orders from the Bankruptcy Court as set forth in Article IX of the Plan.

3.15 Commingling of Litigation Sub-Trust Assets. The Litigation Trustee shall not commingle any of the Litigation Sub-Trust Assets with his or her own property or the property of any other Person.

3.16 Delaware Trustee.

(a) The Delaware Trustee shall have the limited power and authority, and is hereby authorized and empowered, to (i) accept legal process served on the Litigation Sub-Trust in the State of Delaware; and (ii) execute any certificates that are required to be executed under the Delaware Statutory Trust Act and file such certificates in the office of the Secretary of State of the State of Delaware, and take such action or refrain from taking such action under this Agreement, in either case as may be directed in a writing delivered to the Delaware Trustee by the Litigation Trustee and upon which the Delaware Trustee shall be entitled to conclusively and exclusively rely; provided, however, that the Delaware Trustee shall not be required to take or to refrain from taking any such action if the Delaware Trustee shall believe, or shall have been advised by counsel, that such performance is likely to involve the Delaware Trustee in personal liability or to result in personal liability to the Delaware Trustee, or is contrary to the terms of this Agreement or of any document contemplated hereby to which the Litigation Sub-Trust or the Delaware Trustee is or becomes a party or is otherwise contrary to law. The Parties agree not to instruct the Delaware Trustee to take any action or to refrain from taking any action that is contrary to the terms of this Agreement or of any document contemplated hereby to which the Litigation Sub-Trust or the Delaware Trustee is or becomes party or that is otherwise contrary to law. Other than as expressly provided for in this Agreement, the Delaware Trustee shall have no duty or power to take any action for or on behalf of the Litigation Sub-Trust. For the avoidance of doubt, the Delaware Trustee will only have such rights and obligations as expressly provided by reference to the Delaware Trustee hereunder. The Delaware Trustee shall not be entitled to exercise any powers, nor shall the Delaware Trustee have any of the duties and responsibilities, of the Claimant Trustee or the Litigation Trustee set forth herein. The Delaware Trustee shall be one of the trustees of the Litigation Sub-Trust for the sole and limited purpose of fulfilling the requirements of Section 3807 of the Delaware Statutory Trust Act and for taking such actions as are required to be taken by a Delaware Trustee under the Delaware Statutory Trust Act. The duties (including fiduciary duties), liabilities and obligations of the Delaware Trustee shall be limited to those expressly set forth in this Section 3.16 and there shall be no other duties (including fiduciary duties) or obligations, express or implied, at law or in equity, of the Delaware Trustee. To the extent that, at law or in equity, the Delaware Trustee has duties (including fiduciary duties) and liabilities relating thereto to the Litigation Sub-Trust, the other parties hereto or any beneficiary of the Litigation Sub-Trust, it is hereby understood and agreed by the other parties hereto that such duties and

liabilities are replaced by the duties and liabilities of the Delaware Trustee expressly set forth in this Agreement.

(b) The Delaware Trustee shall serve until such time as the Litigation Trustee removes the Delaware Trustee or the Delaware Trustee resigns and a successor Delaware Trustee is appointed by the Litigation Trustee in accordance with the terms hereof. The Delaware Trustee may resign at any time upon the giving of at least thirty (30) days' advance written notice to the Litigation Trustee; provided, that such resignation shall not become effective unless and until a successor Delaware Trustee shall have been appointed by the Litigation Trustee in accordance with the terms hereof. If the Litigation Trustee does not act within such thirty (30) day period, the Delaware Trustee may apply to the Court of Chancery of the State of Delaware for the appointment of a successor Delaware Trustee.

(c) Upon the resignation or removal of the Delaware Trustee, the Litigation Trustee shall appoint a successor Delaware Trustee by delivering a written instrument to the outgoing Delaware Trustee. Any successor Delaware Trustee must satisfy the requirements of Section 3807 of the Delaware Statutory Trust Act. Any resignation or removal of the Delaware Trustee and appointment of a successor Delaware Trustee shall not become effective until a written acceptance of appointment is delivered by the successor Delaware Trustee to the outgoing Delaware Trustee and the Litigation Trustee and any undisputed fees, expenses and indemnity due to the outgoing Delaware Trustee are paid. Following compliance with the preceding sentence, the successor Delaware Trustee shall become fully vested with all of the rights, powers, duties and obligations of the outgoing Delaware Trustee under this Agreement, with like effect as if originally named as Delaware Trustee, and the outgoing Delaware Trustee shall be discharged of its duties and obligations under this Agreement.

(d) The Delaware Trustee shall be paid such compensation as agreed to pursuant to a separate fee agreement. The Litigation Sub-Trust shall promptly advance and reimburse the Delaware Trustee for all reasonable out-of-pocket costs and expenses (including reasonable legal fees and expenses) incurred by the Delaware Trustee in connection with the performance of its duties hereunder.

(e) WTNA shall not be responsible or liable for any failure or delay in the performance of its obligations under this Agreement arising out of or caused, directly or indirectly, by circumstances beyond its control, including without limitation, any act or provision of any present or future law or regulation or governmental authority; acts of God; earthquakes; fires; floods; wars; terrorism; civil or military disturbances; sabotage; epidemics; riots; interruptions, loss or malfunctions of utilities, computer (hardware or software) or communications service; accidents; labor disputes; acts of civil or military authority or governmental actions; or the unavailability of the Federal Reserve Bank wire or telex or other wire or communication facility.

(f) Any corporation or association into which WTNA may be converted or merged, or with which it may be consolidated, or to which it may sell or transfer all or substantially all of its corporate trust business and assets as a whole or substantially as a whole, or any corporation or association resulting from any such conversion, sale, merger, consolidation or transfer to which the Delaware Trustee is a party, will be and become the successor Delaware Trustee under this Agreement and will have and succeed to the rights, powers, duties, immunities

and privileges as its predecessor, without the execution or filing of any instrument or paper or the performance of any further act.

ARTICLE IV. **THE OVERSIGHT BOARD**

The Oversight Board shall be governed by Article IV of the Claimant Trust Agreement.

ARTICLE V. **TRUST INTERESTS**

5.1 Litigation Sub-Trust Interests. On the date hereof, the Litigation Sub-Trust shall issue Trust Interests to the Claimant Trust as the sole Litigation Sub-Trust Beneficiary. The Litigation Sub-Trust Beneficiary shall be entitled to distributions from the Litigation Sub-Trust Assets in accordance with the terms of the Plan and this Agreement.

5.2 Transferability of Trust Interests. No transfer, assignment, pledge, hypothecation, or other disposition of a Trust Interest may be effected.

5.3 Exemption from Registration. The Parties hereto intend that the rights of the Litigation Sub-Trust Beneficiary arising under this Litigation Sub-Trust shall not be “securities” under applicable laws, but none of the Parties represent or warrant that such rights shall not be securities or shall not be entitled to exemption from registration under the applicable securities laws. The Oversight Board, acting unanimously, and Litigation Trustee may amend this Agreement in accordance with Article IX hereof to make such changes as are deemed necessary or appropriate with the advice of counsel, to ensure that the Litigation Sub-Trust is not subject to registration and/or reporting requirements of the Securities Act, the Exchange Act, the TIA, or the Investment Company Act. The Trust Interests shall not have consent or voting rights or otherwise confer on the Litigation Sub-Trust Beneficiary any rights similar to the rights of a shareholder of a corporation in respect of any actions taken or to be taken, or decisions made or to be made, by the Oversight Board and/or the Litigation Trustee under this Agreement.

ARTICLE VI. **DISTRIBUTIONS**

6.1 Distributions. The Litigation Trustee shall distribute Cash proceeds of the Estate Claims to the Claimant Trust within 30 days of receipt of such Cash proceeds, net of any amounts that (a) are reasonably necessary to maintain the value of the Litigation Sub-Trust Assets pending their monetization or other disposition during the term of the Litigation Sub-Trust, (b) are necessary to pay or reserve for reasonably incurred or anticipated Litigation Sub-Trust Expenses and any other expenses incurred by the Litigation Sub-Trust (including, but not limited to, any taxes imposed on or payable by the Litigation Trustee with respect to the Litigation Sub-Trust Assets), and (c) are necessary to satisfy or reserve for other liabilities incurred or anticipated by the Litigation Trustee in accordance with the Plan and this Agreement (including, but not limited to, indemnification obligations and similar expenses).

6.2 Manner of Payment or Distribution. All distributions made by the Litigation Trustee on behalf of the Litigation Sub-Trust to the Litigation Sub-Trust Beneficiary shall be

payable by the Litigation Trustee directly to the Claimant Trust, as sole Litigation Sub-Trust Beneficiary, on the date scheduled for the distribution, unless such day is not a Business Day, then such date or the distribution shall be the following Business Day, but such distribution shall be deemed to have been completed as of the required date.

6.3 Delivery of Distributions. All distributions under this Agreement to the Claimant Trust shall be made pursuant to wire instructions provided by the Claimant Trustee to the Litigation Trustee.

ARTICLE VII. **TAX MATTERS**

7.1 Tax Treatment and Tax Returns. It is intended that the Litigation Sub-Trust will be treated as a grantor trust for federal income tax purposes (and foreign, state, and local income tax purposes where applicable) the sole beneficiary of which is the Claimant Trust. Consistent with such treatment, it is intended that the transfer of the Litigation Sub Trust Assets from the Claimant Trust to the Litigation Sub Trust will be treated as a non-event for federal income tax purposes (and foreign, state, and local income tax purposes where applicable). Further, because the Claimant Trust is itself intended to be treated as a grantor trust for federal income tax purposes (and foreign, state, and local income tax purposes where applicable), it is intended that the beneficiaries of the Claimant Trust will be treated as the grantor of the Litigation Sub-Trust and owner of the Litigation Sub-Trust Assets for federal income tax purposes (and foreign, state, and local income tax purposes where applicable). The Litigation Trustee shall cooperate with the Claimant Trustee in connection with the preparation and filing of any federal income tax returns (and foreign, state, and local income tax returns where applicable) or information statements relating to the Litigation Sub Trust Assets.

7.2 Withholding. The Litigation Trustee may withhold from any amount distributed from the Litigation Sub-Trust to the Litigation Sub-Trust Beneficiary such sum or sums as are required to be withheld under the income tax laws of the United States or of any state or political subdivision thereof. Any amounts withheld pursuant hereto shall be deemed to have been distributed to and received by the Litigation Sub-Trust Beneficiary. As a condition to receiving any distribution from the Litigation Sub-Trust, the Litigation Trustee may require that the Litigation Sub-Trust Beneficiary provide such holder's taxpayer identification number and such other information and certification as may be deemed necessary for the Litigation Trustee to comply with applicable tax reporting and withholding laws.

ARTICLE VIII. **STANDARD OF CARE AND INDEMNIFICATION**

8.1 Standard of Care. None of the Litigation Trustee, acting in his capacity as the Litigation Trustee or in any other capacity contemplated by this Agreement or the Plan, the Delaware Trustee, acting in its capacity as Delaware Trustee, the Oversight Board, or any individual Member, solely in their capacity as Members of the Oversight Board, shall be personally liable to the Litigation Sub-Trust or to any Person (including the Litigation Sub-Trust Beneficiary and Claimant Trust Beneficiaries) in connection with the affairs of the Litigation Sub-Trust, unless it is ultimately determined by order of the Bankruptcy Court or, if the Bankruptcy Court either

declines to exercise jurisdiction over such action, or cannot exercise jurisdiction over such action, such other court of competent jurisdiction that the acts or omissions of any such Litigation Trustee, the Delaware Trustee, Oversight Board, or Member constituted fraud, willful misconduct, or gross negligence. The employees, agents and professionals retained by the Litigation Sub-Trust, the Litigation Trustee, the Delaware Trustee or Oversight Board shall not be personally liable to the Litigation Sub-Trust or any other Person in connection with the affairs of the Litigation Sub-Trust, unless it is ultimately determined by order of the Bankruptcy Court or, if the Bankruptcy Court either declines to exercise jurisdiction over such action, or cannot exercise jurisdiction over such action, such other court of competent jurisdiction that such acts or omissions by such employee, agent, or professional constituted willful fraud, willful misconduct or gross negligence. None of the Litigation Trustee, Delaware Trustee, Oversight Board, or any Member shall be personally liable to the Litigation Sub-Trust or to any Person for the acts or omissions of any employee, agent or professional of the Litigation Sub-Trust or Litigation Trustee, unless it is ultimately determined by order of the Bankruptcy Court or, if the Bankruptcy Court either declines to exercise jurisdiction over such action, or cannot exercise jurisdiction over such action, such other court of competent jurisdiction that the Litigation Trustee, Delaware Trustee, Oversight Board, or Member acted with gross negligence or willful misconduct in the selection, retention, or supervision of such employee, agent or professional of the Litigation Sub-Trust.

8.2 Indemnification. The Litigation Trustee (including each former Litigation Trustee), WTNA in its individual capacity and as Delaware Trustee, the Oversight Board, and all past and present Members (collectively, the “Indemnified Parties”) shall be indemnified by the Litigation Sub-Trust against and held harmless by the Litigation Sub-Trust from any losses, claims, damages, liabilities or expenses (including, without limitation, attorneys’ fees, disbursements, and related expenses) to which the Indemnified Parties may become subject in connection with any action, suit, proceeding or investigation brought or threatened against any of the Indemnified Parties in their capacity as Litigation Trustee, Delaware Trustee, Oversight Board, or Member, or in connection with any matter arising out of or related to the Plan, this Agreement, or the affairs of the Litigation Sub-Trust, unless it is ultimately determined by order of the Bankruptcy Court or other court of competent jurisdiction that the Indemnified Party’s acts or omissions constituted willful fraud, willful misconduct, or gross negligence. If the Indemnified Party becomes involved in any action, proceeding, or investigation in connection with any matter arising out of or in connection with the Plan, this Agreement or the affairs of the Litigation Sub-Trust for which an indemnification obligation could arise, the Indemnified Party shall promptly notify the Litigation Trustee and/or Oversight Board, as applicable; provided, however, that the failure of an Indemnified Party to promptly notify the Litigation Trustee and/or Oversight Board of an indemnification obligation will not excuse the Litigation Sub-Trust from indemnifying the Indemnified Party unless such delay has caused the Litigation Sub-Trust material harm. The Litigation Sub-Trust shall periodically advance or otherwise reimburse on demand the Indemnified Party’s reasonable legal and other expenses (including, without limitation, the cost of any investigation and preparation and attorney fees, disbursements, and related expenses) incurred in connection therewith as a Litigation Sub-Trust Expense, but the Indemnified Party shall be required to repay promptly to the Litigation Sub-Trust the amount of any such advanced or reimbursed expenses paid to the Indemnified Party to the extent that it shall be ultimately determined by Final Order that the Indemnified Party engaged in willful fraud, willful misconduct, or gross negligence in connection with the affairs of the Litigation Sub-Trust with respect to which such expenses were paid. The Litigation Sub-Trust shall indemnify and hold harmless the

employees, agents and professionals of the Litigation Sub-Trust and Indemnified Parties to the same extent as provided in this Section 8.2 for the Indemnified Parties. For the avoidance of doubt, the provisions of this Section 8.2 shall remain available to any former Litigation Trustee, WTNA in its individual capacity and as Delaware Trustee, or Member or the estate of any decedent Litigation Trustee or Member. The indemnification provided hereby shall be a Litigation Sub-Trust Expense. The terms of this Section 8.2 shall survive the termination of this Agreement and the resignation or removal of any Indemnified Party.

8.3 To the extent applicable, the provisions and protections set forth in Article IX of the Plan will apply to the Litigation Sub-Trust, the Litigation Trustee, Oversight Board, and the Members.

ARTICLE IX. **TERMINATION**

9.1 Duration. The Litigation Trustee, the Litigation Sub-Trust, and the Oversight Board shall be discharged or dissolved, as the case may be, at such time as the Litigation Trustee determines that the Estate Claims is not likely to yield sufficient additional proceeds to justify further pursuit of such Estate, and all Distributions required to be made by the Litigation Trustee to the Litigation Sub-Trust Beneficiary under the Plan and this Agreement have been made, but in no event shall the Litigation Sub-Trust be dissolved later than three years from the Effective Date unless the Bankruptcy Court, upon motion made within the six-month period before such third anniversary (and, in the event of further extension, by order of the Bankruptcy Court, upon motion made at least six months before the end of the preceding extension), determines that a fixed period extension (not to exceed two years, together with any prior extensions) is necessary to facilitate or complete the recovery on, and liquidation of, the Litigation Sub-Trust Assets.

9.2 Continuance of the Litigation Trustee for Winding Up. After dissolution of the Litigation Sub-Trust and for purpose of liquidating and winding up the affairs of the Litigation Sub-Trust, the Litigation Trustee shall continue to act as such until the Litigation Trustee's duties have been fully performed. Prior to the final distribution of all remaining Litigation Sub-Trust Assets, the Litigation Trustee shall be entitled to reserve from such assets any and all amounts required to provide for the Litigation Trustee's own costs and expenses, including a reserve to fund any potential indemnification or similar obligations of the Litigation Sub-Trust, until such time as the winding up of the Litigation Sub-Trust is completed. Upon the dissolution of the Litigation Sub-Trust and completion of the winding up of the assets, liabilities and affairs of the Litigation Sub-Trust pursuant to the Delaware Statutory Trust Act, the Litigation Trustee shall prepare, execute and file a certificate of cancellation with the State of Delaware to terminate the Litigation Sub-Trust pursuant to Section 3810 of the Delaware Statutory Trust Act (such date upon which the certificate of cancellation is filed shall be referred to as the "Termination Date"). If the Delaware Trustee's and the Claimant Trustee's signature is required for purposes of filing such certificate of cancellation, the Litigation Trustee shall provide the Delaware Trustee and the Claimant Trustee with written direction to execute such certificate of cancellation, and the Delaware Trustee and the Claimant Trustee shall be entitled to conclusively and exclusively rely upon such written direction without further inquiry. Subject in all respects to Section 3.11, upon the Termination date, the Litigation Trustee shall retain for a period of two (2) years, as a Litigation Sub-Trust Expense, the books, records, and certificated and other documents and files that have

been delivered to or created by the Litigation Trustee. Subject in all respects to Section 3.11, at the Litigation Trustee's discretion, all of such records and documents may, but need not, be destroyed at any time after two (2) years from the Termination Date.

9.3 Termination of Duties. Except as otherwise specifically provided herein, upon the Termination Date of the Litigation Sub-Trust, the Litigation Trustee, the Oversight Board, and its Members shall have no further duties or obligations hereunder.

ARTICLE X. **AMENDMENTS AND WAIVER**

The Litigation Trustee, with the consent of a simple majority of the Oversight Board, may amend this Agreement to correct or clarify any non-material provisions. This Agreement may not otherwise be amended, supplemented, otherwise modified, or waived in any respect except by an instrument in writing signed by the Litigation Trustee and with the unanimous approval of the Oversight Board, and the approval of the Bankruptcy Court, after notice and a hearing; provided that the Litigation Trustee must provide the Oversight Board with prior written notice of any non-material amendments, supplements, modifications, or waivers of this Agreement. No amendment or waiver of this Agreement that adversely affects the Delaware Trustee shall be effective unless the Delaware Trustee has consented thereto in writing in its sole and absolute discretion.

ARTICLE XI. **MISCELLANEOUS**

11.1 Trust Irrevocable. Except as set forth in this Agreement, establishment of the Litigation Sub-Trust by this Agreement shall be irrevocable and shall not be subject to revocation, cancellation or rescission by the Litigation Sub-Trust Beneficiary.

11.2 Litigation Sub-Trust Beneficiary has No Legal Title to Litigation Sub-Trust Assets. The Litigation Sub-Trust Beneficiary shall have no legal title to any part of the Litigation Sub-Trust Assets.

11.3 Agreement for Benefit of Parties Only. Nothing herein, whether expressed or implied, shall be construed to give any Person other than the Litigation Trustee, Oversight Board, and the Litigation Sub-Trust Beneficiary any legal or equitable right, remedy or claim under or in respect of this Agreement. The Litigation Sub-Trust Assets shall be held for the sole and exclusive benefit of the Litigation Sub-Trust Beneficiary.

11.4 Notices. All notices, directions, instructions, confirmations, consents and requests required or permitted by the terms hereof shall, unless otherwise specifically provided herein, be in writing and shall be sent by first class mail, facsimile, overnight mail or in the case of mailing to a non-United States address, air mail, postage prepaid, addressed to:

(a) If to the Litigation Trustee:

Marc S. Kirschner
c/o Goldin Associates LLC, a Teneo Company

350 Fifth Avenue
New York, New York 10118

With a copy to:

Quinn Emanuel LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Attn: Deborah J. Newman
(deborahnewman@quinnemanuel.com)

(b) If to the Claimant Trustee:

Claimant Trustee
c/o Highland Capital Management, L.P.
100 Crescent Court, Suite 1850
Dallas, Texas 75201
Attention: James P. Seery, Jr.

With a copy to:

Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd, 13th Floor
Los Angeles, CA 90067
Attn: Jeffrey Pomerantz (jpomerantz@pszjlaw.com)
Ira Kharasch (ikharasch@pszjlaw.com)
Gregory Demo (gdemo@pszjlaw.com)

(c) If to the Delaware Trustee:

Wilmington Trust, National Association
1100 North Market Street
Wilmington, DE 19890
Attn: Corporate Trust Administration/David Young
Email: nmarlett@wilmingtontrust.com
Phone: (302) 636-6728
Fax: (302) 636-4145

Notice mailed shall be effective on the date mailed or sent. Any Person may change the address at which it is to receive notices under this Agreement by furnishing written notice pursuant to the provisions of this Section 11.4 to the entity to be charged with knowledge of such change.

11.5 Severability. Any provision hereof which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provisions in another jurisdiction.

11.6 Counterparts. This Agreement may be executed by the parties hereto in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument.

11.7 Binding Effect, etc. All covenants and agreements contained herein shall be binding upon, and inure to the benefit of, the Litigation Sub-Trust, the Litigation Trustee, and the Litigation Sub-Trust Beneficiary, and their respective successors and assigns. Any notice, direction, consent, waiver or other instrument or action by any Litigation Sub-Trust Beneficiary shall bind its successors and assigns.

11.8 Headings; References. The headings of the various Sections herein are for convenience of reference only and shall not define or limit any of the terms or provisions hereof.

11.9 Governing Law. This Agreement shall in all respects be governed by, and construed in accordance with the laws of the State of Delaware, including all matters of constructions, validity and performance.

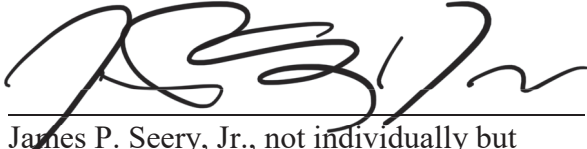
11.10 Consent to Jurisdiction. Each of the parties hereto, each Member (solely in their capacity as Members of the Oversight Board), and each Claimant Trust Beneficiary consents and submits to the exclusive jurisdiction of the Bankruptcy Court for any action or proceeding instituted for the enforcement and construction of any right, remedy, obligation, or liability arising under or by reason of this Agreement, the Plan or any act or omission of the Claimant Trustee (acting in his capacity as the Claimant Trustee or in any other capacity contemplated by this Agreement or the Plan), Litigation Trustee (acting in his capacity as the Litigation Trustee or in any other capacity contemplated by this Agreement or the Plan), the Oversight Board, or any individual Member (solely in their capacity as Members of the Oversight Board); *provided, however,* that if the Bankruptcy Court either declines to exercise jurisdiction over such action or cannot exercise jurisdiction over such action, such action may be brought in the state or federal courts located in the Northern District of Texas.

11.11 Transferee Liabilities. The Litigation Sub-Trust shall have no liability for, and the Litigation Sub-Trust Assets shall not be subject to, any claim arising by, through or under the Debtor except as expressly set forth in the Plan or in this Agreement. In no event shall the Litigation Trustee or the Litigation Sub-Trust Beneficiary have any personal liability for such claims. If any liability shall be asserted against the Litigation Sub-Trust or the Litigation Trustee as the transferee of the Litigation Sub-Trust Assets on account of any claimed liability of, through or under the Debtor or Reorganized Debtor, the Litigation Trustee may use such part of the Litigation Sub-Trust Assets as may be necessary to contest any such claimed liability and to pay, compromise, settle or discharge same on terms reasonably satisfactory to the Litigation Trustee as a Litigation Sub-Trust Expense.

[Remainder of Page Intentionally Blank]

IN WITNESS HEREOF, the parties hereto have caused this Litigation Trust Agreement to be duly executed by their respective officers thereunto duly authorized on the day and year first written above.

CLAIMANT TRUSTEE

By: 
James P. Seery, Jr., not individually but
solely in his capacity as the Claimant
Trustee

LITIGATION TRUSTEE

By: _____
Marc S. Kirschner, not individually but
solely in his capacity as the Litigation Trustee

DELAWARE TRUSTEE

WILMINGTON TRUST, NATIONAL
ASSOCIATION, as Delaware Trustee

By: _____
Name:
Title:

IN WITNESS HEREOF, the parties hereto have caused this Litigation Trust Agreement to be duly executed by their respective officers thereunto duly authorized on the day and year first written above.

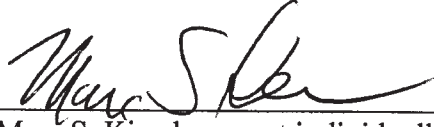
CLAIMANT TRUSTEE

By: _____

James P. Seery, Jr., not individually but
solely in his capacity as the Claimant
Trustee

LITIGATION TRUSTEE

By: _____


Marc S. Kirschner, not individually but
solely in his capacity as the Litigation Trustee

DELAWARE TRUSTEE

WILMINGTON TRUST, NATIONAL
ASSOCIATION, as Delaware Trustee

By: _____

Name: _____

Title: _____

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CLAIMANT TRUSTEE


By: _____
James P. Seery, Jr., not individually but
solely in his capacity as the Claimant
Trustee

LITIGATION TRUSTEE

By: _____
Marc S. Kirschner, not individually but
solely in his capacity as the Litigation Trustee

DELAWARE TRUSTEE

WILMINGTON TRUST, NATIONAL
ASSOCIATION, as Delaware Trustee

By:  _____
Name: Neumann Marlett
Title: Bank Officer